Supreme Court, U.S.
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89-575

No.

In The
Supreme Court Of The United States
October Term, 1989

JOHN J. HARTER, Petitioner
v.
UNITED STATES OF AMERICA, et al., Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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October 10, 1989

QUESTIONS PRESENTED

The Department of State is mandated under the Foreign Service Act of 1980 to conduct promotion review through selection boards and to review errors in that process resulting in separation before the Foreign Service Grievance Board. To meet its burden of proving that an error by a selection board would not have influenced the result of denial of promotion, the Department has resorted to an administrative device of submitting this question to a "reconstituted selection board", established by the Personnel Office, whose conduct is the subject of the grievance. The Grievance Board in turn has accepted the conclusion of the reconstituted board as conclusive evidence of non-promotion. The questions presented are:

(1) Whether administratively created ad hoc reconstituted selection boards offend the statutory and regulatory schemes of promotion through selection boards and resolution of grievances before the Foreign Service Grievance Board.

(2) Whether the Department of State, in attempting to meet its burden to prove that despite errors in its promotion procedure a Foreign Service officer would not have been promoted, may defer to the decision of a "reconstituted selection board."

PARTIES TO THE PROCEEDINGS BELOW

The Petitioner was the Appellant in the United States Court of Appeals for the District of Columbia Circuit and Plaintiff in the United States District Court for the District of Columbia. The Appellees in the Court of Appeals and Defendants in the District Court were the United States of America and the Secretary of State, George P. Shultz.

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OPINIONS BELOW

The opinion of the court of appeals, reported at 871 F.2d 1140, is included in the Appendix. The unpublished opinions of the district court (No. 85-1086, dated January 31, 1986; No. 87-0711, dated November 11, 1987; and No. 87-0711, dated December 21, 1987) are also included in the Appendix. The decisions of the Foreign Service Grievance Board dated March 3, 1985 and January 1, 1987 are included in the Appendix. Other administrative decisions and court decisions are also contained in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 1989. The orders denying rehearing and rehearing en banc were entered on July 12, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The basis of subject matter jurisdiction in the district court is 22 U.S.C. §4140, which gives federal district courts jurisdiction over final actions of the Secretary of State or the Foreign Service Grievance Board under that Act.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Foreign Service Act of 1980 provides that the promotion of Foreign Service officers be based upon recommendations and ranking by selection boards established by the Secretary of State. 22 U.S.C. §4001, et seq. The Act prescribes the composition of the selection boards and the criteria to be applied in ranking officers. Id. §§4002, 4003. Promotions must be in accordance with the rankings. Id. §4005. Those who fail promotion may be separated. Id. §4007. The Act also provides that those involuntarily separated may receive an evidentiary review of selection board error before the Foreign Service Grievance Board, id. 22 U.S.C. §4131(a)(1)(A), and the Board is empowered to correct selection board error by retaining

or promoting the aggrieved officer. Id. §4137(b). Regulations of the Department substantially track the statutory provisions, 22 C.F.R. §§901-10. Section 906 of the regulations guarantees to the grievant a hearing with a right to cross examine witnesses. 22 C.F.R. §906.8.

There is no statutory or regulatory authority for the procedure referred to as a "reconstituted selection board". That process, at issue here, is the creature of inter-office Department memorandum.

STATEMENT OF THE CASE

This case concerns the Department of State's improper substitution of a personnel procedure for promotion review provided by statute. The Foreign Service Act provides that promotion be initiated through independent selection boards, and where failure to achieve promotion may result in separation from the Foreign Service, an officer has a right to a hearing before the Foreign Service Grievance Board to challenge errors of the Selection Board. These two concomitant rights --promotion by independent selection board and review of promotion errors by the Foreign Service Grievance Board -- have been substantially undermined by the Grievance Board's deference to a reconstituted selection board in order to meet the Department's burden of proof that in the face of an established error by the Selection Board, the Department must demonstrate that the grievant would not have been promoted notwithstanding the error.

John Harter was a senior Foreign Service Officer with a 29 year record of service. On his last promotion review by a selection board, Harter's latest evaluation report was not forwarded to the Board. When the omission was discovered near the end of the Board's service, a garbled cable version was sent from his post in Geneva. The tardy cable report contained a falsely prejudicial statement of management skills by misstating a failure to utilize fully an employee who was not under Harter's supervision. The responsible personnel officer made two unauthorized appearances before the Selection Board to discuss Harter's record, thus flagging his consideration. When Harter received notice that he would not be promoted and would be separated from the service, he exercised his right to a hearing before the Grievance Board. The Grievance Board acknowledged the enumerated errors of the Selection Board, but nonetheless affirmed its conclusion denying promotion.

Harter appealed to the district court, which, although it found some of the errors of no consequence, also found as to the er-

ror of prejudicial information in the evaluation report, and that the Grievance Board had failed to apply the appropriate standard of proof, namely the Department must demonstrate that in the face of error, that the grievant would nevertheless not have been promoted. On remand to the Grievance Board, while Harter was awaiting pretrial agreement for presentation of further evidence, his adversary -- the Department's Personnel Office -- selected and convened a rump board, furnished it with selected personnel files of others promoted, along with a corrected Harter evaluation report, and asked it to determine whether on the basis of the information furnished, Harter would have been promoted.

Harter was not advised that this procedure was in progress, had no participation in the selection of this board, and had no knowledge of the information furnished to it. The finding of the rump board -- that Harter would not have been promoted -- was furnished in secret to the Department's grievance counsel, who then used the finding as his sole evidence in support of the Department's position that Harter in any case would not have been promoted. The Board overrode Harter's objection that deference to this unauthorized body was an improper delegation of the Grievance Board's statutory authority to adjudicate his grievance. Relying solely on the conclusion of the reconstituted selection board, the Grievance Board reaffirmed its prior decision of lack of consequential error. It rejected Harter's offer for a comparative analysis of those promoted to his own record. On review, the district court affirmed the Board's finding. The court of appeals affirmed on the ground that the finding of a reconstituted selection board could be used as the sole and conclusive evidence to meet the Department's substantial evidentiary burden that notwithstanding a demonstrated error, the grievant would not be promoted.[1]

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[1]The court of appeals erroneously observed that Petitioner filed numerous grievances during his "twenty year [actually 29 years] Foreign Service career, all of them substantially successful." Id. 1141. In fact Appellant has had only one grievance issue, the right to compete for promotion as guaranteed by the Foreign

REASONS FOR GRANTING THE WRIT

The court of appeals' decision is the first to legitimize the process of a reconstituted selection board and its use in grievance procedures. If undisturbed it will nullify hard won rights guaranteed by the Foreign Service Act of 1980 for both promotion by independent selection boards and grievances of promotion error before the Foreign Service Grievance Board. There is not likely to be a conflict in circuits because the Department of State is headquartered in Washington, D.C. and its selection boards and Grievance Board conduct their activities in that jurisdiction. The case is of exceptional importance because the decision offends the statutory scheme for promotion and grievances designed to achieve excellence in the Foreign Service Corps, while insuring fairness and independence of the promotion process. Further, it affects the basic rights of Foreign Service Officers to compete fairly for promotion and to insure through evidentiary review the integrity of that process. There are currently approximately 4600 Foreign Service officers, primarily responsible for the conduct of foreign affairs, all of whom are subject to these statutes and regulations. Of these, approximately 750 are of the rank of FS-1,[2] the same rank as Mr. Harter, and are most immediately affected because of the large number of involuntary retirements at that rank.

Service Act. Although Petitioner was successful in his first grievance, the two successive ones have essentially been to enforce the award of the first grievance panel.

[2]FS-1 is the highest career rank below the pool of senior Foreign Service Officers.

DEFERENCE TO A RECONSTITUTED SELECTION BOARD FOR RESOLUTION OF PROMOTION ERROR OFFENDS THE FOREIGN SERVICE ACT PROVISIONS FOR PROMOTIONAND GRIEVANCES

An agency must follow its statutory mandate for the conduct of its business.[3] This principle is particularly apt in the agency's conduct of personnel procedures.[4] Further, it is well established that in implementing its statutory mandate, while an agency may not be required to promulgate regulations, it is bound by those it has promulgated.[5] The Department of State's action in deferring to the reconstituted selection board offends both its statutory and regulatory scheme for promotion and grievance.

The Foreign Service Act of 1980 prescribes in detail the method of promotion in the Foreign Service through the establishment of and ranking by selection boards. 22 U.S.C. §4001 et seq. The boards are designed to insure that promotion is effected solely on the basis of comparative merit and not as a consequence of bureaucratic or political favoritism. Ibid. Promotions are based upon the recommendations and rankings of selection boards. 22 U.S.C. §4001(b). The Secretary establishes the selection boards and their membership must include public members and minority representation. 22 U.S.C. §4002. Recommendations and rankings are based upon records of character, ability, conduct, quality of work, indus-

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[3]No one in the Executive Branch may extend an otherwise legal procedure in excess of the authority granted by Congress for the purpose. Cole v. Young, 351 U.S. 536 at 543, 557-58 (1956).

[4]Congress may control the manner in which employees may be separated from government employment. Myers v. United States, 272 U.S. 52 (1926); United States v. Perkins, 116 U.S. 483 (1886).

[5]An agency's own regulations have the force and effect of law and are binding upon the agency that issues them. Accardi v. Shaughnessy, 347 U.S. 260, 267-68 (1954). Moreover, an agency may not effect an employee's discharge in violation of agency regulation. Service v. Dulles, 354 U.S. 363 (1957); Vitarelli v. Seaton, 359 U.S. 535 (1959).

try, experience, dependability, usefulness, and general performance. 22 U.S.C. §4003. Promotions made by the Secretary must be in accordance with the rankings of the selection boards. Id. §4005. Those who fail to be promoted may be separated from the service after remaining a maximum time in class. Id. §4007.

Because the Foreign Service is a highly competitive corps of specialized professionals and may result in early separation for those who do not progress, the Act has, through its grievance mechanism, insured that this process be scrupulously fair. At the same time, Congress recognized that errors can occur in the normal Selection Board process, especially as a consequence of defective performance ratings. Accordingly, it provided explicit procedures to ensure that the Foreign Service Grievance Board would have exclusive jurisdiction to review and correct any selection board error that might occur.[6] Specifically, the Act: (1) defines the term "grievance" as including involuntary retirement resulting from falsely prejudicial information in a performance rating, 22 U.S.C. §4131(a)(1)(A); (2)

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[6]Foreign Service grievance legislation is unique in government service. Although originally proposed in 1971, it was not enacted until 1980, in part because of strenuous opposition by the Department. In introducing the legislation, Senator Bayh explained: "The purpose of the legislation...is to bring about a significant change in the operation of State Department personnel policy...[s]incé...it has become increasingly evident that State Department employees have not been extended their full order of employee rights as guaranteed by Supreme Court decisions." U.S. Foreign Service Grievance and Appeals Procedure, 1971: Hearings on S.2023, S.2659 and 2662 Before The Comm. on Foreign Relations, 92d Cong., 1st Sess. 71 (1971)(S. Bayh). The published record of the hearings shows the opposition of the Department's personnel authorities to that legislation. Nevertheless, and despite their continuing opposition, the Congress included grievance procedures in the Foreign Service Act of 1980. See The Foreign Service Act of 1979, Hearings on S.1450, Before the Comm. on Foreign Relations, 96th Cong., 1st Sess. (1979). What the Department was unable to prevent in legislation, it has now defeated administratively through the device of the reconstituted selection board.

establishes the Foreign Service Grievance Board ("FSGB") to deal with grievances, 22 U.S.C. §4135; (3) empowered the FSGB "to retain in the Service" a Foreign Service Officer "whose separation would be in consequence of the matter by which he is aggrieved," 22 U.S.C. §4137(b)(3); and (4) endowed the FSGB with sufficient authority to promote Foreign Service Officers who present "meritorious grievances," 22 U.S.C. §4137(b)(2)(6). A matter properly before the Grievance Board shall constitute the exclusive remedy for the grievance. 22 U.S.C. §4139.[7]

Foreign Service Regulations precisely track the same statutory provisions, 22 C.F.R. §§905, 906. Furthermore, the FSGB Regulations provided for a mandatory hearing at the request of a grievant "in any case which involves...a grievant's retirement from the Service for expiration of time-in-class," 22 C.F.R. 906.2; and the Regulations guarantee the right to cross-examine at the hearing, 22 C.F.R. 906.8.

In marked contrast, the reconstituted selection board falls outside this statutory and regulatory scheme, and its use totally undermines the statutory structure. There is no authority in the Act or in any published regulations of the Department of State for the device referred to as a "reconstituted selection board". A reconstituted selection board is in conflict with the statutory promotion procedure through selection boards and review and correction of error by the Foreign Service Grievance Board.

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[7]In the case of involuntary separation, the Act empowers the Board to grant interim relief to a grievant by suspending his separation during the pendency of his grievance. 22 U.S.C. (4136(8). Even that relief was withheld from Harter on the preliminary finding that his grievance was frivolous and that he was not entitled to a hearing. The Board later acknowledged that Harter was entitled to a hearing, but after error had been established and the burden of proof shifted to the Government, the Board refused to reverse its conclusion on interim relief, thus substantially denying Petitioner the means to pursue his right to a hearing and subsequent review. Of course, the subsequent review established that the Board had applied the wrong legal standard as to burden of proof.

The reconstituted selection board is a creature of inter-office memorandum. It was structured as a device to meet the substantial burden recognized in Reiner v. United States, 686 F.2d 1017, 1021 (D.C. 1982) (Reiner II), citing Reiner v. United States, Civ. Action No. 78-0616, Slip Op. (D.D.C. April 30, 1979) (Reiner I). Although the initial burden is upon the grievant to show that the Department's failure was a substantial factor in the failure to be promoted, once established, the burden shifts to the Department to establish "by a preponderance of the evidence that, even in the absence of the Department's administrative error, [grievant] would not have been promoted." Ibid.[8] To meet this formidable burden the Personnel Office established that a reconstituted selection board, composed of members of similar composition as selection boards, would review the files of five officers immediately above the cut off line for promotion and rank them along with the grievant. After ranking, the reconstituted selection board was to determine if the grievant would have been promoted. This procedure was supposedly applied in the Harter case, although no knowledge of its existence, selection of its membership, or what records were placed before it, was ever made known during its deliberation. In its one-day meeting it concluded that Harter would not have been promoted. That naked conclusion, without substantiation or explanation, was then placed before the Foreign Service Grievance Board. The grievance board accepted this conclusion as meeting the Department's burden and reaffirmed its prior finding.

There is no authority in the Act or in any published regulations for the device the Department chose to call a "Reconstituted

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[8]It was on the basis of Reiner that the district court ruled that Harter had "carried his initial burden of showing that (certain comments in his 1983 performance rating) may have been a substantial factor in the failure to promote him..." The court therefore remanded the matter to the Grievance Board "with instructions to consider whether the Department has carried its burden of showing that Plaintiff would not have been promoted even in the absence of those critical comments..." (emphasis added) Slip. Op. at 7.

Selection Board," as used in this case. Furthermore, as shown above, the Grievance Board itself, just as it would have done in reviewing the conduct of the Selection Board, was obligated under the law and regulations to weigh any and all evidence that might have been relied upon by a reconstituted board, to produce a conclusion concerning promotion. The Foreign Service Grievance Board should not have deferred to a non-statutory body to assume its functions, and in doing so, it manifestly abdicated its statutory responsibility under 22 U.S.C. §4136.

Clearly the Grievance Board erred in adopting the conclusion of the reconstituted selection board as its own, given the fragility of that conclusion and its nature as hearsay, as well as Petitioner's timely objections to the procedure involved. The lower court and the court of appeals erred in sanctioning that procedure.[9]

The court of appeals' decision conflicts not only with its own rule in Reiner, 686 F.2d at 1021, but with Daniels v. Wick, 812 F.2d 729 (D.C.Cir. 1987), where the court held that the FSGB was

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[9]The court of appeals' decision accepts the Department's claim that their resort to the reconstituted selection board procedure was motivated by their desire to "replicate" the statutorily authorized Selection Board procedure. The reconstituted selection board process itself is inherently unfair. The members of the reconstituted board were selected by the Department itself -- without consultation with Petitioner -- through a process they did not divulge. The reconstituted board cannot possibly reconstruct the Selection Board process. It views only a handful of files, while the Selection Board views hundreds. In Harter's Selection Board there were 526 officers under review. The reconstituted board knows it is not performing an actual promotion, but convened only to support an earlier finding now under challenge. The grievant is frequently identified -- "red flagged" -- because of omissions in his file or by knowledge of the board members, and there is no means of testing this prior knowledge. While error can be identified before the Selection Board, the reconstituted board deliberation is impenetrable. The American Foreign Service Association is present at the briefings of the Selection Board, but its participation is barred at reconstituted selection board proceedings.

not empowered to make a decision relating to tenure in the Foreign Service because the Act explicitly specified that such decision should be made by the Tenure Board. Id. at 735-36. Here, Petitioner has shown that the Act envisaged that the FSGB itself should correct any errors emanating from the statutorily mandated Foreign Service promotion system and not redelegate its authority to a body essentially controlled by Respondents, who are themselves the adverse party in this litigation. [10]

The appeals decision is squarely at odds with the doctrine established in Accardi, that an agency must follow its own established regulations and procedures, rather than rely on a "non-statutory board composed of subordinates within a department headed by the individual who formulated, announced, and circulated such views of the pending proceeding." Accardi v. Shaughnessy, 347 U.S. 260, 267-68 (1954). Cf. also Service v. Dulles, 354 U.S. 363 (1956); United States of America v. Exxon Corporation, 470 F.Supp. 674 (D.C.Cir. 1979), aff'd 616 F.2d 526 (Em.Ct.App. 1980).

The reconstituted selection board's conclusion also fails as admissible evidence. It is in conflict with Section 906.8 of the Foreign Service Grievance Board Regulations, which guarantees a Foreign Service grievant facing involuntary retirement the right to cross-examine witnesses. 22 C.F.R. §906.2. Moreover, it is Black Letter Law that a report or investigation prepared in contemplation of litigation is not admissible evidence. Palmer v. Hoffman, 318 U.S. 109 (1943).

Finally, the conclusory statement of an unauthorized body violates the Federal Rules of Evidence. The Reconstituted Selection Board was hearsay, as defined by Rule 801(c) of the Federal Rules of Evidence, because it was not a statement "made by a declarant

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[10]See also Skinner v. United States, 594 F.2d 824, 830 (Ct.Cl. 1979): "The integrity and objectivity of the rating system go to the very heart of the military establishment's effectiveness, and all we do here is to preserve it as the statutes and authorized procedures contemplate and mandate."

while testifying at a proceeding offered in evidence to prove the truth of the matter asserted" and it did not fall within any of the "classes of statements [that are not hearsay] explicitly defined in the Federal Rules of Evidence."[11]

In resorting to a convenient administrative device to meet its formidable burden that its error did not affect promotion, the Department of State has departed from its statutory mandate, implemented by its own regulations of promotion by properly constituted selection boards, and review of promotion error by adjudication before the Foreign Service Grievance Board. In doing so, the Department is at odds with its statutory mandate. If uncorrected, this decision will substantially diminish the rights of Foreign Service Officers and undermine Congress' prescription for achieving competitive superiority in the Foreign Service Corps.

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[11]The court of appeals misapprehended the significance of the decisions of the Supreme Court in Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, 435 U.S. 519, 524 (1978) and F.C.C. v. Schreiber, 381 U.S. 279, 290-91 (1965) (both of which involve rulemaking rather than adjudicatory proceedings), as well as its own decision in Cities of Batavia, et al. v. F.E.R.C., 672 F.2d 64, 88 (D.C.Cir. 1982), inasmuch as Petitioner's contention here is not "founded on an impermissible view of the Board's procedural discretion in admitting evidence in grievance proceedings," but rather upon the view that the Foreign Service Grievance Board, when admitting such "evidence," must do so in accord with the standards of fairness which the Supreme Court has set out in past decisions. See also, Vitarelli v. Seaton, 359 U.S. 535, 540 (1958), "scrupulous observance of departmental procedural safeguards is clearly of particular importance". These safeguards were held to include the right to cross-examine. Id. at 544.

CONCLUSION

For the foregoing reasons, Petitioner prays that the Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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Appellant,
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UNITED STATES OF AMERICA
and
GEORGE P. SHULTZ,
Secretary of State,
Department of State,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 28, 1989

Decided April 11, 1989

No. 87-5419

JOHN J. HARTER, APPELLANT

v.

UNITED STATES OF AMERICA, et al.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 87-00711)

Alan Raywid for appellant.

John J. Harter also entered an appearance for appellant.

Susan Z. Holik and *Joseph B. Kennedy* were on the brief for *amicus curiae* American Foreign Service Association, Government Accountability Project, and Committee Against Government Waste, urging reversal.

Diane M. Sullivan, Assistant United States Attorney, with whom *Jay B. Stephens,* United States Attorney, *John D. Bates* and *R. Craig Lawrence*, Assistant United States Attorneys, were on the brief, for appellees.

Before: MIKVA, SILBERMAN and SENTELLE, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge:* Appellant John J. Harter was involuntarily retired from the Foreign Service in 1983 because he failed to gain promotion to the Senior Foreign Service within the timeframe set by regulation under the Foreign Service Act of 1980, as amended, 22 U. S. C. Sections 3901-4226 (1982 & Supp. IV 1986). Harter filed a timely grievance with the Foreign Service Grievance Board ("FSGB"), asserting, *inter alia,* that unfairly critical statements in his personnel file may have contributed to his "pass-over." Following the Board's initial denial of his grievance, Harter obtained a district court order directing the Board to require the State Department to establish that

Harter would not have been promoted even absent the prejudicial remarks. On remand to the Board, the State Department sought to discharge its burden through the use of a Reconstituted Selection Board ("RSB") that compared Harter's file to those of the lowest qualified candidates who were promoted in Harter's 1983 class. The Board accepted the State Department's proffer of the RSB evidence and denied Harter's grievance. The district court affirmed and Harter now appeals. We affirm.

I.

Appellant filed numerous grievances during his twenty-year Foreign Service career, all of them substantially successful. Of particular relevance to the instant proceeding was a grievance Harter filed in 1980, when he faced mandatory prospects comparable to those he confronted in 1983. *See* U. S. C. Sec. 4007 (1982) (describing "up or out" system of promotion within Foreign Service). The

1980 grievance was settled by Harter in exchange for a three-year extension of time-in-class during which the Department would present Mr. Harter's performance file to all selection boards convened for the purpose of making promotion decisions for officers of his grade. Pursuant to the settlement, Harter was evaluated and ranked each year from 1981 to 1983, but did not fare well. In 1981 he was ranked low in comparison with other economic officers and toward the middle class-wide. In both 1982 and 1983, based on his Employee Evaluation Report ("EER"), Harter was ranked in the middle ranges with respect to both categories of officers.

In 1983, Harter thus failed to make the promotion cut and, once again, was faced with imminent involuntary retirement. Claiming that certain comments in his 1983 EER were unfairly prejudicial, Harter grieved to the FSGB. After a hearing, the Board determined that any claimed deficiencies in the 1983 EER were not a substantial

factor in Harter's non-promotion. Harter immediately sought review of the Board's determination in district court pursuant to 22 U. S. C. Sec. 4140.

The district court, in a memorandum opinion, found some of the challenged comments in the 1983 EER to be "troublesome" and agreed with Harter that their presence "could well have been a substantial factor in the Selection Board's review." *Harter v. United States*, No. 85-1086, slip op. at 6-7 (D. D. C. Jan. 31, 1986). The court therefore held that Harter had met "his initial burden," *id.* at 7 (citing *Reiner v. United States*, 686 F. 2d 1017, 1021 (D. C. Cir. 1982)) and remanded the matter to the FSGB "with instructions to consider whether the Department has met its burden of showing that plaintiff would not have been promoted even in the absence of these critical comments . . . ." *Id.*

On remand, the State Department convened an RSB to replicate the decisionmaking process of the original selection board and produce evidence as to whether Harter would have been promoted in 1983 if his file had been clean. The RSB was asked to compare Harter's redacted file against the files of the lowest-ranking officers on the 1983 list of those promoted. The RSB ultimately ranked Harter below the other officers whose files were before it, and the Department transmitted these results to the FSGB as part of its case on remand. The FSGB credited the RSB results and subsequently held that the Department had met its but-for burden "by a mechanism that resembles as closely as possible the selection boards that are mandated in the Foreign Service Act." This determination was subsequently affirmed by the district court. *Harter*, No. 87-0711, slip op. (D. D. C. November 4, 1987).

II

Although Mr. Harter raises a number of challenges to the process that ended in his mandatory retirement, we believe only one issue -- concerning the use of the RSB -- merits discussion.[1] We understand Harter to raise two independent objections to the RSB procedure. First, he contends that the Foreign Service Act does not permit the State Department to use -- and the FSGB to credit -- the results of RSB deliberations in grievance proceedings. In the alternative, Harter alleges that it was arbitrary and capricious for the FSGB to rely on the RSB's conclusions in resolving Harter's particular grievance. Neither objection is substantial, in our judgment.

Harter's statutory claim is premised on the absence of mention in statute (or regulation) of the permissibility of an RSB proceeding, but it is this

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[1] Harter's other concerns, in our view, are either irrelevant to this appeal or have been addressed adequately in the district court's opinion.

very premise that undermines appellant's position. As Harter has conceded, nothing in the language of the Foreign Service Act or its legislative history is specifically directed to the permissibility or impermissibility of accepting as evidence in a grievance proceeding the conclusions drawn by an RSB. What little the Act does say is unfavorable to appellant: the Act explicitly sanctions the use of "any oral or documentary evidence" in grievance proceedings involving a hearing, subject to a requirement that the Board exclude "any irrelevant, immaterial, or unduly repetitious evidence." 22 U. S. C. Sec. 4136(4) (1982). Without specific congressional intent on the question, *see Chevron USA Inc. v. Natural Resources Defense Council,* 467 U. S. 837, 843-44 (1984), Harter faces the uphill challenge of demonstrating that the FSGB's determination to credit the RSB results is founded on an impermissible view of the Board's procedural

discretion in admitting evidence in grievance proceedings.[2] *See, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 435 U. S. 519, 524 (1978); FCC v. Schreiber, 381 U. S. 279, 290-91 (1965); *Cities of Batavia, et al. v. FERC,* 672 F. 2d 64, 88 (D. C. Cir. 1982).

We do not think Harter has met this analytical burden of demonstrating either that the Board has unreasonably applied its broad procedural authority under the Foreign Service Act or that it is irrational, *per se,* for the Board to permit the introduction of evidence generated through the use of an RSB. As the Board noted in its opinion on remand, in fashioning remedies under the Act, it is not enough

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[2] Harter correctly notes that the Act requires the Board, on request, to hold a hearing in grievances such as his, *see* 22 U. S. C. Sec. 4136(1)(A) (1982), but this requirement in no way prevents the Board from admitting at such hearings extra-hearing "documentary" evidence of the results of an RSB review. *Id.* Sec. 4136(4).

merely to determine that the grievant possesses certain objective qualities that make him "promotion material"; "promotion opportunities are seldom sufficient to include all who are recommended" for promotion by a selection board. Instead, it is necessary to inquire as to whether the grievant would have been among those actually promoted in his class, and this requires a comparison of the grievant's file against some portion of the files of promotees. In endorsing the use of an RSB to conduct this comparison, we believe the Board reasonably opted to rely on "a mechanism that resembles as closely as possible the selection boards that are mandated in the Foreign Service Act." After all, section 4002 of the Act *requires* the Secretary of State, with few exceptions, to base Foreign Service promotion decisions *in the first instance* on the recommendations of selection boards. *See* 22 U. S. C. Sections 4001(b) & 4002(a)(1) (1982). What better way, it might be asked, to replicate the conditions of the original

selection board environment than to conduct a "paper competition" involving the grievant's file and a representative sample of the files of those candidates on the low end of the promotion list in the grievant's class?

Harter's rejoinder is that selection boards in general, and reconstituted boards in particular, are peculiarly unsuited for use in assessing the promotability of Foreign Service officers who have grieved successfully in the past. Harter argues that a candidate with a successful grievance behind him will forever have a blemished employment file (because, for instance, of an unusual amount of time-in-class), and he urges that such candidates are entitled to special treatment to ensure that the State Department's previous mistakes do not continue to prejudice their promotion prospects. It is unclear what sort of "special treatment" Harter envisions, although we gather he urges an independent objective assessment of his over-all

merit by the Foreign Service Grievance Board. Nevertheless, whatever the specifics of Harter's approach, it would necessarily imply a noncomparative assessment in which Harter's promotion *vel non* would not depend on the quality of those against whom he was competing. There would be no room in Harter's plan for the sort of competitive, ordinal ranking envisaged by the Act for promotion decisions generally. *See* 22 U. S. C. Sections 4002 & 4003 (1982). As such, his approach would seem to give a previously successful grievant a distinct advantage over the other members of his class in gaining promotion to the next level.

Given the role that candidate-to-candidate competition plays in the Foreign Service promotion process, we do not think it was unreasonable for the Board to approve the use of RSB procedures to gauge the promotability of candidates in Harter's position. In crediting the results of reconstituted

boards, the FSGB has harmonized the Foreign Service Act's strong preference that promotion decisions be made in a competitive fashion through selection boards composed of the peers of Foreign Service members and its objective of "maintaining" a fair and effective system for the resolution of individual grievances . . . ." 22 U. S. C. Sec. 3901(b)(4) (1982). We do not mean to suggest that the Act prohibits the Board from relying on some sort of independent "expert" assessment of a grievant's promotability in the exercise of its responsibilities. But it surely does not prevent the Board from sanctioning RSB procedures to perform the same function. It was plainly within the Board's discretion to fashion the grievance-resolution process after the statutory promotion procedure.[3]

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[3] Harter contends that the State Department's RSB procedures are structurally biased, in that the RSB is "unilaterally created" by the State Department and convened without the grievant's participation. It appears from the record, however, that the

Appellant argues that *Ehrman v. United States*, No. 82-1984, slip op. (D. D.C. Aug. 31, 1983), a case in which the district court ordered retroactive promotion of a Foreign Service officer due to a cumulation of prejudicial errors, should control this appeal. We disagree. The State Department, as far as we can discern, did not reconstitute a selection board to discharge its burden in *Ehrman*; had it done so, the resulting evidence might have established that the grievant would not have been promoted absent the Department's mistakes. And to the extent *Ehrman* suggests that the selection board procedures

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procedures used by the State Department in selecting RSB members and conducting deliberations bear a close resemblance to the procedures governing original selection board proceedings. *See* 22 U. S. C. Sections 4002, 4003 (1982). As to the latter contention, moreover, we do not see how the grievant would avoid identification if he were permitted to participate in the RSB proceeding, and this, according to Harter, would defeat the impartiality of the procedure.

erected by the Foreign Service Act are *inherently* incapable of being applied fairly to a Foreign Service officer who may have been awarded additional time-in-class due to mistakes made early in his career, we reject that notion. Indeed, in the instant case, Harter himself (in settling his prior grievances in exchange for additional time-in-class) expressly bargained for the use of a statutory selection board in a closely analogous situation.

Bearing in mind the scope of the Board's discretion under the Foreign Service Act, appellant's alternative argument -- that it was arbitrary and capricious for the Board to credit the results of the RSB convened to resolve Harter's *particular* grievance -- fails as well. Harter complains that the RSB's sample, six in number, was not an "appropriate cross section" of Harter's 1983 class, but we think this charge goes only to the weight, and not to the "admissibility" of the resulting evidence. In that connection, we do not believe it

was irrational for the FSGB to assign significant weight to the conclusion of Harter's RSB, which ranked appellant below both the three lowest-ranked class-wide promotees and the two lowest-ranked officers who were promoted out of Harter's functional classification in 1983. And Harter's allegation that the chairman of his RSB "had an established public record of bias" against him is baseless, having been adequately addressed in the FSGB's opinion on remand. To be sure, we do not rule out the possibility that, in some circumstances, it might be arbitrary for the FSGB to deny a grievance in substantial reliance on the results of a reconstituted selection board proceeding. But we see nothing in the record before us that draws the Board's reliance on such a proceeding into question. The judgment is in all respects

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 83-2321 September Term, 1984
Civil Action No. 83-02975

John J. Harter,

Appellant

United States Court of Appeals
for the District of Columbia Circuit

v.

FILED DEC 7 1984

George P. Shultz, U. S.
Secretary of State, et al.

GEORGE A. FISHER
CLERK

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Before: WALD, EDWARDS, and BORK, Circuit Judges.

JUDGMENT

Before: WALD, EDWARDS, and BORK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c). On consideration thereof and for the reasons set forth in the accompanying memorandum, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause isl hereby affirmed. It is

FURTHER ORDERED, sua sponte, that the Clerk shall withold issuance of the mandate herein until seven days after disposition of any timely

petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam

For The Court

/ s /

George A. Fisher

Clerk

John J. Harter v. George Shultz, Sec'y of State, et al., No. 83-2321

MEMORANDUM

John J. Harter, a former Foreign Service Officer, appeals from the dismissal of his complaint against the Department of State and two of its officers. Harter sought to compel the Department to suspend his discharge pending its resolution of a grievance allegedly related to the reasons for his discharge. The district court found that the Department's denial of interim relief was not final agency action, and therefore dismissed the complaint. We agree that Harter's claims under the Foreign Service Act of 1980 fail for lack of final

agency action, and also decide that Harter's allegations of constitutional violations do not state a claim on which relief could be granted. We therefore affirm the judgment of the district court.

In September of 1983, the Department informed Harter that effective September 30, he would be discharged for "expiration of time in class," or failure to be promoted within the maximum time allowed for Foreign Service officers of his rank. See Complaint Para. 2, R. Item 1.[1] Harter promptly filed a grievance with the Deputy Assistant Secretary of State for Personnel. Id. Para. 3. In essence, the grievance alleges that a number of different errors affecting the handling and content of material in Harter's file and the implementation of promotion recommendations

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[1] In accordance with Fed. R. Civ. P. 12(b), we accept Harter's well-pleaded factual allegations as true for purposes of our decision.

unfairly prejudiced his chances for promotion.[2] See id. Para. 4; Outline of Grievance, R. Item 3, Exhibit 5. The grievance was denied on September 28, 1983. Complaint Para 5, R. Item 1; Letter from Andrew L. Steigman to John J. Harter at 5 (Sept. 28, 1983), R. Item 3, Exhibit 7. Harter appealed to the Foreign Service Grievance Board, requesting both relief on the merits and interim reinstatement in the Foreign Service pending ultimate resolution of his grievance. Complaint Para. 6, R. Item 1; Letter from John J. Harter to Ray Perkins (Sept. 28, 1983), R. Item 3, Exhibit 8. The Board denied Harter's request for interim relief and refused a request for reconsideration of that denial. Complaint Paras. 17-

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[2] Because decisions of Foreign Service selection boards not to promote an officer cannot be made the subject of a grievance, see Foreign Service Act of 1980 Sec. 1101(b)(2), 22 U. S. C. Sec. 4131(b)(2), Harter's grievance does not directly attack decisions not to promote him and his consequent discharge. However, the Board may orderl reinstatement and back pay for a successful grievant based on discharge-related grievances. Id. Sec. 1107(b)(4), 22 U. S. C. 4137(b)(4).

9, R. Item 1; Letter from Raymond L. Perkins to John J. Harter (Sept. 29, 1983), R. Item 3, Exhibit 9; Letter from Raymond L. Perkins to John J. Harter (Sept. 30, 1983), R. Item 3, Exhibit 11.

On October 6, 1983, Harter brought suit to compel the Department to restore him to the Foreign Service until the Board ruled on his grievance. The district court dismissed the complaint on December 16, 1983, Harter v. Shultz, No. 83-2975 (D. D. C. Dec. 16, 1983), and this appeal followed.

Harter relies principally on section 1110 of the Foreign Service Act of 1980, 22 U. S. C. Sec. 4140, which permits an aggrieved party to seek judicial review of a "final action" by the Board.[3] We

[3] Although Harter's complaint asserted that the district court had jurisdiction under administrative regulations that in essence reiterate the statutory grant of jurisdiction in Sec. 4140, see Complaint Para 10, R. Item 1; 22 C. F. R. Sec. 909.5 (1984), he

need not exhaustively canvass the law of administrative finality to conclude that in the circumstances of this case, the Board's denial of interim relief was not final action. Generally, "[i]n determining whether an order is sufficiently final for purposes of judicial review, 'the relevant considerations . . . . are whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action.'" American Dairy, Inc. v. Bergland, 627 F. 2d 1252, 1260 (D. C. Cir. 1980) (quoting Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U. S. 62, 71 (1970)). Here, review of the Board's decision would evidently require us to assess the Board's preliminary conclusions that the grievance was frivolous and

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has abandoned this argument, see Reply Brief of Appellant at 3 n. 2.

not integral to Harter's discharge. It would thus require examination of questions that are inextricably tied to the merits of the grievance still before the Board. We are unwilling to thrust the courts into the midst of an agency proceeding on the justifications offered to us in this case.

Plainly, the statute conferring general federal-question jurisdiction, 28 U. S. C. Sec. 1331, cannot be understood to frustrate specific statutory limits on the powers of the federal courts, such as the finality requirement. Cf. ITT World Communications, Inc. v. Federal Communications Comm'n. 104 S. Ct. 1936, 1939-40 (1984). Nor does Section 706 of the Administrative Procedure Act, 5 U. S. C. Sec. 706, enable this court to review a nonfinal order of the Board. See Califano v. Sanders. 430 U. S. 99, 107 (1977). Because this action does not seek to compel performance of a ministerial duty, Harter's reliance on sections 1(a) and 2 of the Mandamus and Venue Act of 1962, 28

U. S. C. Sections 1361, 1391(e), is also unavailing. Finally, the All Writs Act, 28 U. S. C. Sec. 1651, provides no general authority for a court to "stay" a nonfinal and otherwise unreviewable agency order.[4]

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[4] In Sampson v. Murray, 415 U. S. 61(1974), the Supreme Court noted that the All Writs Act in some circumstances permits courts to grant "an interim stay of final agency action pending statutory judicial review." Id. at 73 (emphasis added); see also id. at 73-74 & nn. 26 & 28. In this case, however, Harter seeks immediate review of the agency's nonfinal order denying an administrative "stay," and the line of cases discussed in Sampson is therefore inapposite.

Sampson also suggested that in limited circumstances, the version of the Civil Service Act then in force might permit the courts to grant preliminary injunctive relief ordering the reinstatement of a government employee pending final administrative review of the employee's discharge. See id. at 69. Thus, if interim relief was ever to be available, it could come only from the courts. Under the Foreign Service Act, however, Congress has expressly charged the Board with deciding when interim relief is appropriate. Cf. Arrow Transp. Co. v. Southern Ry. Co. , 372 U.... S. 658 (1963) (discussed in Sampson, 415 U. S. at 79-80). We therefore may not intervene in the

The district court did not address Harter's argument that he has a constitutionally protected property interest in continued employment with the Department, and that a post-discharge hearing on his grievance is inadequate to satisfy the requirement of due process. The argument directed to the constitutional claim in this court and in the district court was extremely limited. Cf. Carducci v. Regan, 714 F. 2d 171, 177 (D. C. Cir. 1983). As a result, we hold only that to the extent Harter's complaint may be read to allege that he has any constitutionally protected property interest that encompasses employment with the Foreign Service pending the Board's final resolution of his grievance, see Complaint Para 29(d), R. Item 1, the procedures concededly available to him are

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grievance proceeding except under the congressionally prescribed conditions for judicial review, which require a final order.

sufficient to protect those interests. Cf. Mathews v. Eldridge, 424 U. S. 319, 339-49 (1976). Harter's complaint was therefore vulnerable to a motion to dismiss for failure to state a claim upon which relief can be granted, see Fed. R. Civ. P. 12(b)(6), and we affirm the district court's judgment of dismissal on that basis. See Boykin v. District of Columbia, 689 F. 2d 1092, 1099 (D. C. Cir. 1982) (court of appeals may affirm dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(6)).

IN THE UNITED STATES DISTRICT COURT[1]

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-1086

JOHN J. HARTER,

Plaintiff,

v.

UNITED STATES OF AMERICA, and DAVIES, GEORGE P. SHULTZ,

Defendants.

FILED
JAN 31 1986
JAMES F.
Clerk

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[1] The Department of State has again filed a lengthy administrative record, haphazardly put together and lacking tabs, pagination or any orderly compilation to aid the parties and the Court. The Department should review its procedures in this regard. Counsel will be held responsible in the future if this all too frequent practice is repeated.

This complaint seeks review of a decision of the Foreign Service Grievance Board dated March 8, 1985, 22 U. S. C. Sec. 4140, rejecting plaintiff Harter's claim that he was improperly denied promotion and separated from the Foreign Service. The extensive administrative record has been filed.[1] Plaintiff has moved for summary judgment, seeking reinstatement, backpay, and promotion. Defendants have moved to affirm. The issues have been fully briefed.

Plaintiff was separated from the Foreign Service in 1983 because his time in FSO-1 class had expired when the Senior Threshold Selection Board failed to promote him from FSO-1 to Senior Foreign Service Officer. He contends that he was denied a pre-termination hearing required by the Constitution, that the Foreign Service breached a 1980 Settlement Agreeement resolving a prior grievance, and that his 1983 Employment Evaluation Report (EER), which was of particular

significance to his opportunity for promotion from the Selection Board, contained prejudicial errors and was mishandled by the Department in a manner that adversely affected fair consideration of his case.

Plaintiff entered the Foreign Service in 1954. He moved up the ranks to FSO-4. In 1971, he pursued a successful grievance alleging that errors by the Department of State had impaired his opportunities for advancement. The Grievance Committe recommended that he be promoted to FSO-3 (a classification designated FSO-1 after the Foreign Service Act of 1980) and be assigned to a senior economic position.[2] He was promoted, in accordance with the Committee's recommendation, but never received the mainstream Foreign Service assignment that could have allowed him to demonstrate supervisory and managerial skills.

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[2] Plf. Summary Judgment Ex. 2.

Instead, he was assigned to the United States Information Agency and was unsuccessful in seeking reassignment until 1980 when, facing mandatory retirement, he filed another grievance which concluded in a settlement extending his time in class until September 30, 1983 in exchange for plaintiff withdrawing all his prior claims with prejudice.[3]

In August, 1981 plaintiff was reassigned to his first choice among available positions and sent to Geneva to serve as U. S. Liaison Officer to the United Nations Conference on Trade and Development. He was not promoted to the Senior Foreign Service in 1981 or 1982. His future status then became dependent on the action of the 1983 Senior Threshold Board. The Selection Board failed to promote him and he was separated from the Service.

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[3] Plf. Summary Judgment Ex. 26.

Plaintiff again grieved to the Foreign Service Grievance Board and, after being denied interim relief, sought this judicial review. The Court's review of the Grievance Board's decision is limited to determining whether or not the Board's decision was contrary to law, arbitrary and capricious and,
since the Board's decision must be based on the hearing record, whether it is supported by substantial evidence. 22 U. S. C. Sections 4136, 4137, 4140; 5 U. S. C. Sec. 706.

Plaintiff's first contention is frivolous. He argues that he was entitled to a pre-termination hearing, citing Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487 (1985), and Board of Regents v. Roth, 408 U. S. 564 (1971). Plaintiff was not removed for cause, nor was he deprived of any property right. Foreign service officers only hold their positions during their time in class and are

regularly separated out when this time expires if they have not been promoted to a higher position. 22 U. S. C. Sec. 4007. This is a normal process accepted by every foreign service officer at time of employment. It does not impose any stigma impugning Harter's good name, reputation, honor or itegrity. No constitutionally protected interest was impaired by plaintiff's separation. No pre-termination hearing was required. In accordance with the statute and regulations, plaintiff's claims for interim relief were reviewed and denied and he received a full hearing on the merits of his complaint before the Foreign Service Grievance Board.

Plaintiff's next claim that the Secretary breached the 1980 Settlement Agreement must also be denied. Plaintiff urges that as part of the settlement the Department made an oral commitment to reassign plaintiff immediately. The Grievance Board found this claim was not supported

by the record. The alleged oral commitment was not included in the Settlement Agreement. Plaintiff knew at the time he signed the Settlement Agreement on December 22, 1980 that the Geneva position he desired would not be available until July, 1981. The Department reassigned him to that position in a prompt manner and he was properly reviewed by the Selection Board in 1981 and 1982, in accordance with the settlement. The Board's conclusions were supported by the record and must be affirmed. Although the "spirit" of the settlement may have been better served by some other result, delay was caused by factors beyond the Department's control and there is no indication that the Department did anything improper.

Plaintiff urges that he was adversely affected by the manner in which his 1983 review for promotion was handled. The presentation of plaintiff's file and his 1983 EER to the 1983 Selection Board was plagued by a number of

procedural mishaps and substantive errors. The Grievance Board concluded, however, that these lapses were not a substantial factor in the decision to deny plaintiff's promotion. First, plaintiff's 1983 EER was not in his file for review when the Selection Board initially began reviewing the files in mid-July, 1983. A copy of the EER was requested from the Geneva mission and it was sent telegraphically on August 10, about one month before the Board completed its review.[4]

The Selection Board reviews hundreds of files. Files frequently arrive incomplete and the Selection Board is asked to hold back on reviewing these files until they are complete. (Tr. 156-58, 163-66). The Selection Board reviews files that are completed late in the same way as those presented to it earlier. Given this procedure for assuring that files receive fair and adequate consideration, the

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[4] Plf. Summary Judgment Ex. 41.

Grievance Board properly concluded that although the late arrival of plaintiff's EER was an obvious deficiency, plaintiff had failed to show he had been prejudiced by it.

Most of plaintiff's remaining objections are similarly without merit if not frivolous. The telegraphic copy of the 1983 EER submitted to the Selection Board had some paragraphs transposed but was not "garbled" in any way that denied plaintiff fair consideration by distorting its meaning. Clearly inadmissible comments were properly deleted by the staff of the Selection Board as soon as they became aware of them. Plaintiff was not prejudiced by staff inquiries of the Selection Board before it reached a final decision because these inquiries were prompted by plaintiff's efforts to get early notice of the Board's determination and had no relation to the merits. The written opinion of the Grievance Board sets forth these and other claims, followed by well-

reasoned discussion and findings. After careful review the Court finds the Board's factual determinations are supported by substantial evidence and the ruling was clearly not arbitrary or capricious, except in respect to one troublesome issue.

The troublesome issue concerns the poossible prejudicial effect of misleading or erroneous comments in the 1983 EER relating to Harter's potential for promotion which the Department has acknowledged should have been deleted. Grievance Board Dec. p. 24-27. The 1983 EER gives a very favorable, sometimes glowing evaluation of Harter's abilities and service to the Department but stops short of recommending him for promotion. The rating officer made four mildly critical comments, three of which the Department, subsequent to the Selection Board's decision, offered to delete. These comments included a negative comment on Harter's potential for

promotion which incorporates the other critical comments. After these comments are deleted there are only a few other statements directly addressing plaintiff's potential for promotion, all but one of which were favorable.

The Grievance Board concluded, however, that in light of the generally favorable statements in the EER the deleted criticisms that were presented to the Selection Board were not a substantial factor in the decision not to promote Harter. The Grievance Board did not purport to be making a comparison of plaintiff with others who were selected for promotion, but simply evaluated his EER as a whole. Competition for promotion to Senior Foreign Service officer is very keen and a few improper critical comments in an otherwise laudatory evaluation could well have been a substantial factor in the Selection Board's review. Plaintiff carried his initial burden of showing that these comments may have been a substantial factor

in the failure to promote him. Reiner v. United States, 686 F. 2d 1017, 1021 (D. C. Cir. 1982). The reasoning offered by the Grievance Board in rejecting plaintiff's prima facie showing was not supported by substantial evidence.

Consequently, the Court finds that it is necessary to remand this matter to the Foreign Service Grievance Board with instructions to consider whether the Department has carried its burden of showing that plaintiff would not have been promoted even in the absence of these critical comments and determine what relief, if any, is appropriate. Since the Grievance Board did not claim to be comparing plaintiff with other foreign service officers in the decision on review, the Court finds that it was not erroneous to deny plaintiff discovery of information on other officers, but if a comparative evaluation is made on remand the Court suggests that discovery may be appropriate.

An appropriate Order is filed herewith.

/s/ Gerhard A. Gesell

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UNITED STATES DISTRICT JUDGE

JANUARY 31, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-1086

JOHN J. HARTER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	FILED
and	)	JAN 31 1986
GEORGE P. SHULTZ,	)	JAMES F. DAVEY
Secretary of State,	)	Clerk
	)	
Defendants.	)	

ORDER

For reasons stated in a Memorandum filed with this Order it is hereby

ORDERED that plaintiff's motion for summary judgment is denied in part and granted in part; and it is further

ORDERED that defendants' motion for affirmance is granted in part and denied in part; and it is further

ORDERED that plaintiff's grievance is remanded to the Foreign Service Grievance Board for proceedings in accordance with the Court's Memorandum to determine whether plaintiff would have been promoted in the absence of the comments that defendants have acknowledged should be deleted from plaintiff's 1983 EER and determine what relief, if any, is appropriate; and it is further

ORDERED that the complaint is dismissed with prejudice.

ORDERED that plaintiff's grievance is remanded to the Foreign Service Grievance Board for proceedings in accordance with the Court's Memorandum to determine whether plaintiff would have been promoted in the absence of the comments that defendants have acknowledged should be deleted from plaintiff's 1983 EER and determine what relief, if any, is appropriate; and it is further

ORDERED that the complaint is dismissed with prejudice.

/s/ Gerhard A. Gesell

UNITED STATES DISTRICT JUDGE

January 31, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN J. HARTER,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 85-1086
	)	
UNITED STATES and	)	
GEORGE P. SCHULTZ, Secretary	)	
of State, Department of State,	)	
	)	
Defendants.	)	

MEMORANDUM

After consideration of plaintiff's application for attorneys fees pursuant to 28 U. S. C. Sec. 2412, defendant's opposition thereto, and plaintiff's reply, the Court finds that plaintiff's application is premature and must be denied.

Plaintiff sought review of a decision of the Foreign Service Grievance Board affirming the Senior Threshold Selection Board's decision not to promote him. The Senior Threshold Board's decision resulted in plaintiff's separation from the foreign service because his time in class had expired. Plaintiff sought reinstatement, backpay, and promotion. On cross-motions for summary judgment or affirmance, the Court found most of plaintiff's challenges to the Board's decision meritless, if not frivolous, except for one. The Court found that the Board's explanation of why certain deleted comments could be discounted was not supported by substantial evidence and remanded to the Board to consider whether the Department had carried its burden in showing that these comments were not a factor in the decision not to promote plaintiff. The Board was instructed to determine what relief, if any, is appropriate.

At this point in the proceedings plaintiff has not obtained any of the relief on the merits which he sought and cannot be awarded fees as a "prevailing party" under 28 U. S. C. Sec. 2412. Plaintiff did not request a remand to the Foreign Services Grievance Board as his chosen, or even alternative form of relief, in his complaint or motion for summary judgment. The Court's remand, which contemplates that the Board will reevaluate the record and may find it necessary to consider additional comparative evidence, may or may not result in plaintiff ultimately receiving the relief he seeks but it does not make him a prevailing party at this stage. See McGill v. Secretary of Health and Human Services, 712 F. 2d 28 (2d Cir. 1983); Von Luetzow v. Director, Office of Personnel Management, 562 F. Supp. 684, 685 (D. D. C. 1983); cf. Hanrahan v. Hampton, 446 U. S. 754, 757 (1980).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN J. HARTER,	)
	)
Plaintiff,	)
	) Civil Action
v.	) No. 85-1086
	)
UNITED STATES and	)
GEORGE P. SCHULTZ, Secretary,	)
Department of State,	)
	)
Defendants.	)

Order

For reasons stated in the Court's Memorandum filed herewith, it is hereby

ORDERED that plaintiff's application for attorneys fees is denied without prejudice to renewal if plaintiff receives any of the relief on the merits he seeks.

/s/

UNITED STATES DISTRICT JUDGE

April 4, 1986

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

JOHN J. HARTER,	)
	)
Plaintiff,	)
	) Civil Action No. 87-0711
v.	)
	)
UNITED STATES OF AMERICA, ET AL.,	)
	)
	)
Defendants.	)

ORDER

For the reasons stated in the Court's Memorandum filed this day, the motion of defendants for affirmance of the decision of the Foreign Service Grievance Board is granted; the motion of plaintiff for summary judgment is denied and the complaint is dismissed.

/s/
Gerhard A. Gesell

UNITED STATES DISTRICT JUDGE

November 4, 1987.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN J. HARTER,	)
	)
Plaintiff,	)
	)Civil Action
v.	)No. 87-0711
	)
UNITED STATES OF AMERICA, ET AL.,	)
	)
	)
Defendants.	)

MEMORANDUM

This Foreign Service Promotion Selection case is back before the Court by way of a new complaint attacking the decision of the Foreign Service Grievance Board following the Court's limited remand Order of January 31, 1986. Harter v. United States, Civil Action No. 85-1086 (Memorandum and Order filed Jan. 31, 1986). Extensive briefs have been filed along with a

stipulated Administrative Record and cross-motions to reject[1] or to affirm the Board's decision have been fully argued.

The pertinent direction in this Court's remand Order reads as follows:

> ORDERED that plaintiff's grievance is remanded to the Foreign Service Grivance Board for proceedings in accordance with the Court's Memorandum to determine whether plaintiff would have been promoted in the absence of the comments that defendants have acknowledged should be deleted from plaintiff's 1983 EER and determine what relief, if any, is appropriate; . . . .

---

[1] Plaintiff has incorrectly captioned his motion as a Motion for Summary Judgment since the standard of review of agency action is whether or not the action on remand was arbitrary or capricious and supported by substantial evidence. 22 U. S. C. A. Sections 4136, 4137, 4140 (Supp. 1987); 5 U. S. C. A. Sec. 706 (1977).

In 1983 Mr. Harter was a candidate for promotion from FS-1 to the Senior Foreign Service. He failed to be promoted and he grieved.

The remand resulted from the following circumstances. Mr. Harter's 1983 Employee Evaluation Report ("EER") (Plaintiff's Exhibit 42, filed Sept. 3, 1985 in Civil Action No. 85-1086) gives a very favorable, sometimes glowing evaluation of his abilities and service to the Department of State but stops short of recommending him for promotion. The rating officer made four mildly critical remarks. Three of these comments were later incorporated by reference into a summary evaluation paragraph which expressed the view based on other material as well that there was a continuing need to oversee Mr. Harter's work. The referenced comments did not support this negative statement in the evaluation. Subsequent to the Selection Board's decision, the Department offered to delete the

referenced material from the summary evaluation paragraph.

A redetermination of Mr. Harter's failure to be promoted was, in the Court's view, therefore required and a remand was ordered. The Grievance Board, on remand, found that Mr. Harter would still not have been entitled to promotion. In challenging this decision, Mr. Harter has raised several separate claims, each considered separately below.

(1) Mr. Harter contends that the deletions in his EER ordered by the Court were not made. The report still contained critical remarks amid the many highly commendable remarks preceding the summary evaluation. The Grievance Board properly interpreted the remand Order. The Court never intended to rewrite the EER or to exclude critical remarks for whatever significance they might have when unrelated to the issue of Mr. Harter's need for oversight.

(2) Mr. Harter contends that the proceedings before the Grievance Board were contrary to the applicable rules and regulations. The Department in presenting evidence to the Board relied primarily on a decision by a Reconstituted Selection Board that Mr. Harter would not have been promoted if the deletions had been made when the original selections were made. This Court did not direct nor did it suggest that a reconstituted selection board was required. There is no regulation of the Board that mandates such a reconstituted board be used or not used in cases such as this. See generally 22 C. F. R. Ch. IX (1987).

The applicable regulations provide in Section 906.2 that the Board shall conduct a hearing. Id. at Sec. 906.2. The Department of State carried the burden of proof before the Grievance Board on remand and chose to present at

(3) Mr. Harter challenges the composition of the reconstituted Board, claiming the chairman was biased and should have been replaced. The evidence is to the contrary.

(4) Mr. Harter complains that he was denied some of his discovery requests. The Grievance Board's rulings in this regard appear reasonable and well within the Board's discretion.

This discovery problem reflects misunderstanding by Mr. Harter's counsel of the role of the Grievance Board on remand. The Court did not order a re-examination of the Foreign Service Selection Board's procedures, or of the merits of its prior decisions. This was not the occasion to examine whether or not different ways might be found to improve the fairness and innate uncertainties of any "selection or out" type of process. Many of the discovery controversies now re-presented to this Court following remand are the

result of overly broad or irrelevant demands. There is no merit in these claims.

(5) Finally, Mr. Harter urges that the Department of State has not met its burden. This is a matter of fact and law.

As far as the factual issue is concerned, the Administrative Record of the remand proceedings, as narrowly confined within the terms of the remand Order, amply supports the conclusion that it is unlikely that Mr. Harter would have been promoted had the deletions been made at the time of the challenged selection. The preponderance of the evidence weighs in favor of the Department.

The Grievance Board has recognized that its role is not purely mechanical. Part of its role also is to alleviate inequities in appropriate situations by some form of equitable relief. The present case, not unlike other non-selection cases,

raises the underlying concern whether a Foreign Service officer's institutional reputation, if marked by prior grievances and controversy, may not have been such that re-examination of his record in a selection review situation is consciously or unconsciously biased. Mr. Harter claims his experience in this regard made him such a "marked man" and that he should have been treated equitably to correct cumulative career damage, citing Ehrman v. United States, Civil Action No. 82-1984 (D. D. C. August 31, 1983).

The Grievance Board addressed this position squarely, declined to accept it for stated reasons, and the Court has no basis for substituting its own discretion for that of the Board. Mr. Harter has received minute attention to his every protest and action has been taken where the facts justified it. His personnel file does not portray him as a maverick or an opponent of the Department's mission.

Mr. Harter does have an understandable sense of frustration with Department of State personnel practices and procedures. The 1983 EER portrays him as an outstanding public servant who as chief resident United States negotiator has used his superior education and extensive training to effectively guide, report on and improve the United Nations Conference on Trade and Devlopment (UNCTAD), a permanent multilateral world organization dealing with economic problems between the developed and developing countries. Working up to 60 hours a week, without adequate support staff, he carried an enormous work load and demonstrated a keen ability to keep Washington informed while at the same time giving useful guidance to UNCTAD in Geneva, aided by his fluency in three languages and some knowledge of two other languages. The Department recognized his significant achievement and he was evaluated as capable of making a valuable contribution to the

Foreign Service "for years to come." Yet he failed to achieve promotion and was out of the Service. Both the promotion system and budgetary constraints took their toll. Undoubtedly many others with similar ability and dedicated service have also failed.

The Court has thoroughly reviewed Mr. Harter's concerns. It must and does grant the Department's Motion to Affirm the Decision of the Grievance Board on Remand but in so doing this in no respect deprecates Mr. Harter's public service.

An appropriate Order is filed herewith

/s/
Gerhard A. Gesell -

UNITED STATES DISTRICT JUDGE

November 4, 1987.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
OCT 11

1983
JOHN J. HARTER,) JAMES F. DAVEY,
Clerk
)
Plaintiff,)
) Civil Action No.
83-1975
v.)
)
GEORGE P. SHULTZ, et al.,)
)
Defendants.)
)
)

ORDER

This matter came before the Court on October 7, 1983, on plaintiff's application for a temporary restraining order. Plaintiff has failed to demonstrate 1) that he is likely to succeed on the merits of his claim; 2) that he will suffer

irreparable harm if the requested relief is denied; 3) that there will be no substantial harm to other parties of interest if the requested relief is granted; and 4) that the public interest favors the issuance of a temporary restraining order. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F. 2d 841, 843 (D. C. Cir. 1977); Virginia Petroleum Jobbers Association v. FPC, 259 F. 2d 921, 925 (D. C. Cir. 1958). Accordingly, upon consideration of plaintiff's application for a temporary restraining order, defendants' opposition, the accompanying memoranda of law, the argument of counsel, and the entire record herein, it is this 11th day of October, 1983,

ORDERED that plaintiff's application for a temporary restraining order be, and hereby is, denied.

/s/

NORMA HOLLOWAY JOHNSON

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN J. HARTER,	)	FILED
	)	DEC 16 1983
	)	JAMES F. DAVEY,
PLAINTIFF,	)	Clerk
	)	Civil Action
v.	)	No. 83-2975
	)	
GEORGE P. SHULTZ, ET AL.,	)	
	)	
DEFENDANTS.	)	

MEMORANDUM OPINION

Plaintiff, a former Foreign Service Officer, brings this action for injunctive and declaratory relief against the United States Department of State, the Secretary of State, and the Deputy Assistant of State for Personnel. Plaintiff alleges that defendants violated the Foreign Service Act of 1980 (Act); 22 U. S. C. Sec. 4001 et seq. (1976 ed. & Supp. V 1981), and certain Foreign Service Regulations promulgated pursuant to the Act by refusing to

suspend plaintiff's separation from the Foreign Service pending resolution of issues before the Foreign Service Grievance Board (Board).

On October 11, 1983, this Court denied plaintiff's application for a temporary restraining order. The matter is presently before the Court on defendants' motion to dismiss and plaintiff's motion for a preliminary injunction ;that would enjoin defendants from terminating plaintiff's employment including all rights, benefits, salaries, and other perquisites of a Foreign Service Officer, pending resolution of his grievance by the Board and by the court on any available appeal. For the reasons more fully stated herein, the Court will grant defendants' motion to dismiss for lack of subject matter jurisdiction.

Factual Background

On September 30, 1938, plaintiff was officially separated from the Foreign Service. Prior to his separation, however, plaintiff filed a grievance with the Department of State pursuant to the applicable regulations. See State Department Grievance Regulations, 3 FAM Sections 661-668. Plaintiff requested, inter alia, that his September 30th separation be suspended pending resolution of his grievance. On September 28, 1983, the Deputy Assistant Secretary for Personnel for the Department of State (Department) informed plaintiff that his grievance was "frivolous" and "not integral" to plaintiff's September 30th separation, and, accordingly, all relief requested by plaintiff was denied. Plaintiff then appealed to the Foreign Service Grievance Board (Board) to review the Department's denial of his relief. 3 FAM Sec. 666.1. The Board accepted plaintiff's grievance on September 29, 1983. However, it denied plaintiff's request for a suspension of his separation. Plaintiff moved for reconsideration of the Board's denial of

prescriptive relief, but the Board again refused to order the suspension of plaintiff's separation. Thereafter, plaintiff instituted this action for declaratory and injunctive relief.

DISCUSSION

It is axiomatic that federal courts are courts of limited jurisdiction and their subject matter jurisdiction depends totally upon congressional enactment of a constitutional grant of subject matter jurisdiction. See F.T.C. v. Compagnie De Saint-Gobain-Pont-a-Mousson, 636 F. 2d 1300 (D. C. Cir. 1980). A party seeking to invoke the limited jurisdiction of the federal court has the burden of establishing jurisdiction, and he must at least allege in his complaint operative facts which bring the controversy within the jurisdiction of the court. The jurisdictional averment of plaintiff in this case states that jurisdiction is "based on State Department Grievance Regulations (3 FAM 668) and

Section 909.5 of the Grievance Board Regulations (22 CFR, Ch. IX), . . .with the standards set forth in chapter 7 of Title 5 of the United States Code." Plaintiff's jurisdictional averment is clearly defective for neither the State Department nor the Foreign Service Grievance Board have authority under the Foreign Service Act of 1980 or any court construction of the Act to grant jurisdiction in federal courts by regulation. Moreover, the jurisdictional provision of the Act requires administrative finality as a prerequisite to judicial review. Section 1110 provides in pertinent part that "[a]ny aggrieved party may obtain judicial review of a final action of the Secretary or the Board on any grievance in the district courts of the United States . . . ." See Section 1110 of Act, 22 U. S. C. Sec. 4140. It is clear that there has not been final action by the agency in this case. On September 28, 1983, plaintiff filed his grievance with the Board; on September 29, the Board accepted plaintiff's grievance and issued an interlocutory decision

denying the request for prescriptive relief. The grievance, however, is still pending before the Board. The established law in this Circuit is that an aggrieved party may obtain immediate review of a nonfinal administrative decision only when there is no practical means of procuring effective relief after the conclusion of administrative proceedings, and the party faces irreparable injury. Papago Tribual Utility Authority v. Federal Energy Regulatory Comm'n., 628 F. 2d 235, cert. denied 449 U. S. 1061 (1980). The final decision of the Board in this case will provide plaintiff effective relief. If the final decision of the Board is that plaintiff's grievance is meritorious, the Board has the authority to direct the agency to reinstate plaintiff and to grant back pay. 22 U. S. C. Sec. 4137(b)(4). Given the foregoing considerations, it is evident that this Court is without subject matter jurisdiction. An Order consistent with this Opinion will be entered on this date.

/s/

NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

DATE: December 16, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
DEC 16 1983
JAMES F. DAVEY
Clerk

JOHN J. HARTER,)

Plaintiff,)

v.) Civil Action
No. 83-2975

GEORGE P. SHULTZ, ET AL.,)

Defendants.)

ORDER

UPON consideration of the motion of plaintiff for preliminary injunction and the motion of defendants to dismiss, the oppositions, the argument of counsel, and the entire record herein, it is this 16th day of December, 1983,

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ORDERED that the motion of plaintiff for a preliminary injunction be and hereby is denied, and it is further

ORDERED that the motion of defendants to dismiss be and hereby is granted, and it is further

ORDERED that the complaint herein be and hereby is dismissed.

/s/

NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

...

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

John J. Harter,
Grievant

Record of Proceedings

No. G-83-106-State-68

and

Date: March 8, 1985

The Department of State

For the Foreign Service Grievance Board:

Presiding Member: John H. Fanning

Board Members: Philip F. Dorman

Alfred O. Haynes

Special Assistant to the Board: William W. Rhodes

Representative for the Grievant:

Alan Raywid
Attorney

Representative for the Department:

Michele E. Truitt
Director, Grievance Staff

I. THE GRIEVANCE

John J. Harter, then a Foreign Service Officer in class FS-1, filed a grievance with the Department of State on September 23, 1983. He claimed that procedural and substantive infirmities in the preparation and handling of his 1983 Employee Evaluation Report (EER) made it impossible for him to be promoted that year, thus resulting in his separation from the Foreign Service. He also claimed that the intent of a Settlement Agreement signed in 1980 was breached by Department errors and failure.

Included in the relief grievant seeks are expunction of the 1983 EER, retroactive reinstatement with back pay, retroactive promotion, assignment to a position specified by grievant, amendment or removal of various documents, and reimbursement for attorney fees.

In its final Agency review of September 3, 1983, the Department offered to delete two sentences from the EER. It contended that these sentences were of minor import and had no significant impact on the EER. It refused any other remedy. On that same day grievant filed an appeal with the Foreign Service Grievance Board.

A prehearing conference was held on July , 1984, at which the Board decided to hold a ormal hearing. A second prehearing conference vas conducted on August 21. The Board ruled that ssues arising from events and circumstances redating the Settlement Agrement of December 2, 1980 would be excluded from the present case. The hearing was held on September 17 and 18. A ranscript was made and copies were sent to the arties. The Department submitted its post hearing rief on October 29 and grievant submitted his on Jovember 7.

advising Mr. Harter of his mandatory retirement pursuant to Section 633 of the Foreign Service Act of 1946, as amended.

2. The Department will extend Mr. Harter's time-in-class to September 30, 1983.

3. The Department will submit Mr. Harter's Official Performance File to any and all Selection Boards reviewing officers at Mr. Harter's grade that shall be convened in the period between the date of this agreement and September 30, 1983.

4. Any new regulations promulgated by the Department between the date of this agreement and September 30, 1983, that shall be applicable to other officers in Mr. Harter's grade shall also be deemed to be applicable to Mr. Harter and shall take precedence over this agreement with respect to any extension of time in the employ of the Department beyond September 30, 1983. However, any such new regulations that might otherwise curtail Mr. Harter's employment with the Department before September 30, 1983, shall be deemed to have been superseded by the terms of this agreement.

II. This agreement disposes of all claims made by Mr. Harter in connection with his grievance, covered by Record of Proceedings No. 80-565-State-323, and Mr. Harter understands that he is herewith foreclosed from raising any of those claims before any adjudicative forum. The

grievance, in other words, is withdrawn with prejudice.

From May 4 to July 10, 1981 Harter was enrolled in French language training at the Foreign Service Institute (FSI) in preparation for his scheduled assignment to Geneva. In August he began a tour of duty at the U. S. Mission to Geneva as an international economist, with responsibilities as the chief resident U. S. negotiator at the United Nations Conference on Trade and Development (UNCTAD).

Selection Boards met on an annual basis during the period July - September in 1981, 1982, and 1983. Following its practice for officers of class 1, the Boards ranked Harter twice in each of those years: once in classwide competition and again in competition with other economic officers. In 1981 his evaluation covered his performance in his final year at USIA. That year he was low-ranked in competition with other economic officers in his

class; he was mid-ranked in classwide competition. The EER he received in 1982 rated his performance in Geneva over an eight-month period. The Selection Boards that reviewed his file that year mid-ranked him with respect to classwide competition as well as in competition with other economic officers. The EER he received in 1983 covered a full year's work in the Geneva job. He was mid-ranked that year in competition classwide and with other economic officers. Not having achieved promotion in 1981, 1982, or 1983, Harter was designated for separation from the Service effective September 30, 1983 for expiration of time in class, pursuant to the terms of the Settlement Agreement. He filed a grievance with the Department, and upon its denial, appealed to the Grievance Board shortly before his separation was effected. His request to the Board to stay his scheduled separation pending the outcome of his appeal was denied.

III. POSITIONS OF THE PARTIES, DISCUSSION AND FINDINGS

The voluminous record in this case includes copious material concerning grievant's career history and claims of earlier damage that are outside the scope of this grievance. As we view the dispute, the core issues that dominate this grievance are, first, his claim that the 1980 Settlement Agreement was breached through Department errors and failures; and second, his claim that serious procedural and substantive deficiencies connected with his 1983 EER foreclosed or severely prejudiced his chance for promotion in 1983, the last opportunity provided by the Settlement Agreement.

The parties presented comprehensive briefs setting forth their positions and arguing the import of the evidence submitted. While each brief

has been fully and carefully reviewed, we see no constructive purpose in setting out each of the many points made. In presenting the Board's analysis of the case, the positions of the parties with respect to each issue will first be given, followed by the Board's findings and conclusions concerning the merits of the respective positions.

A. Alleged Breach of the 1980 Settlement Agreement

Grievant's Position

Grievant asserts that the 1980 Settlement Agreement was intended to give him fair and equal chances at promotion in the Selection Board process in 1981, 1982, and 1983. This guarantee was not safeguarded, he claims, with the effect that the Settlement Agreement was breached by errors, and by prejudice that his EERs for those years occasioned in Selection Board consideration of his promotability. The crux of his complaint, with particular regard to the 1981 and 1982 rating

years, is that he was not placed in an appropriate Foreign Service assignment in a timely manner. He explains that during the period the Settlement Agreement was being negotiated, his personnel counselor told him that he believed "once my time in class was extended by three years, that he would be able to give me such an assignment." Grievant adds that before the Settlement Agreement was signed, his career counselor proposed his assignment to UNCTAD in Geneva. He signed the agreement, he says, after he understood from the counselor that he was definitely going to propose Harter for that position. However, he alleges, there were inordinate delays in effecting his assignment to UNCTAD, and it was not until eight months after the Settlement Agreement was signed that he went into that position. As a result, he states, he continued in the USIA assignment through the 1980-1981 rating period. He asserts that he was prejudiced by this circumstance in the Selection Board review of his 1981 EER. In corroboration, he

draws attention to the comments of the 1981 Selection Board which low ranked him in competition with other economic officers in his class. The Board observed in its low ranking statement that by reason of his lengthy USIA assignment he had served "for too long in Washington" and had had less opportunity than his peers "to demonstrate the supervisory and management skills required for an assessment of potential."

In 1982, grievant alleges, he again did not have a fair opportunity to compete for promotion. This was due, he maintains, to prejudice occasioned by the fact that his EER for that year covered only an eight-month period of his performance in UNCTAD. Although he states that he is generally satisfied with that report, he stresses that it covered only two-thirds of his first year's work at the post. He contends that time was improperly lost in accomplishing his transfer to Geneva because

of opposition for several months by the post. The effect of Department delay in placing him in UNCTAD, he submits, was to deny him an opportunity to compete for promotion fairly in 1981 and 1982.

Department's Position

The Department declares that settlement agreements must be read for what they state, but not for what they do not state. It holds that there was no breach of the Settlement Agreement; that every effort was made to insure that grievant was treated fairly and that he properly compete like all of his peers seeking promotion to Senior Foreign Service. The agency points out that there is no claim by him of any impropriety in the 1981 and 1982 EERs, and it disputes his contention that he was injured in the assignment process relating to his posting to Geneva.

The chronology of grievant's assignment to Geneva, as explained by the agency, can be summarized as follows:

When grievant submitted his bid list in accordance with the open assignments policy in October 1980, the UNCTAD position was his first choice. His bid list showed the figure "781" which denoted that the position would be available in July 1981. Thus, he knew then and at the time the Settlement Agreement was signed that if he were selected for UNCTAD, he would not begin his tour there until the summer of 1981. Therefore he knew he would not be rated on his performance in Geneva for the 1980-1981 period which ended on April 15, 1981 and for which he received an EER based on his assignment in USIA. The review before the 1981 Selection Board was therefore not flawed, the Department maintains.

The Department insists that grievant's assignment to Geneva was not delayed beyond its originally scheduled date. Also, it rejects grievant's contention that his assignment was improperly opposed. A post may prefer a certain candidate, it explains; such preferences are aired in panel metings, but they are not decisive, and in his case preferences for another candidate were not persuasive.

Discussion and Findings

In assessing the merits of grievant's position, we have carefully examined the record for evidence that supports his contentions. On the facts and circumstances before us, we find that the grievant has not established that the Settlement Agreement was breached. There is no evidence to show that he was improperly in the USIA position in the 1980-1981 rating period or that the 1981 evaluation of his performance in that position was

wrongful. We have not overlooked the fact that the 1981 Selection Board which low ranked him apparently believed that his long assignment in USIA diminished his competitiveness with other economic officers in his class. However, the Selection Board's comment doesl not demonstrate that the Settlement Agreement was breached. The Agreement is devoid of any mention of that or any other assignment.

The record dealing with the chronology of grievant's assignment to Geneva affords no basis for a finding that his transfer was effected in a manner that violated the Agency's assignment process. The evidence contradicts his assertion that the assignment was inordinately delayed.

We see no prejudice to grievant by reason of his evaluation in 1982 on the basis of a period of only eight months in the Geneva job. The rating period was April 1981 to April 1982.

Grievant arrived at post in August 1981 and was properly rated from that point to the end of the rating period. We are not persuaded that he was prejudiced by this circumstance in Selection Board review in 1982.

With regard to grievant's contention that time was lost in his transfer to Geneva because of opposition at post to his assignment, we find no evidence that the dialogue between Washington and Geneva concerning his and other candidates' qualifications had the effect of delaying his assignment. The position did not become available until July; grievant arrived at post the beginning of August. Also, we do not believe that the post's initial preference for another candidate was an injustice to the grievant, given the nature of the assignment process and particularly in view of the fact that ultimately he was chosen for the assignment.

In sum, the record affords no justification for a conclusion that the Settlement Agreement was breached in 1981 or 1982. The claim that the Settlement Agreement was breached also by deficiencies surrounding grievant's 1983 EER is inter-related with the second major issue in this case, which is addressed below.

B. Alleged Procedural and Substantive Infirmities in the Preparation and Handling of Grievant's 1983 EER.

Grievant asserts that the central issue before the Board is the 1983 EER and its impact on his opportunity for fair competition in the 1983 selection process. He claims that multiple and serious procedural and substantive irregularities concerning the preparation and handling of his 1983 EER deprived him of his right to an opportunity to compete equitably for promotion that year. We shall present the claimed procedural irregularities first.

1. Procedural Irregularities

Grievant states that while he was on home leave in the summer of 1983, he expressed a concern to certain officials of the Department that because of his past experience, procedural errors might undermine his prospects for promotion. Because of this concern, grievant states, he asked these officials to take appropriate steps to ensure that no irregularities occurred which might impede his chances to compete fairly for promotion in 1983. However, despite his warnings, grievant claims, four procedural irregularities occurred concerning his performance evaluation and the Selection Board consideration of his promotability. A discussion of each of the four allegations together with the Department's position and finding of this Board follows.

(a) "Grievant's 1983 EER was lost after it arrived in the Department and it was missing during the first critical weks the Senior Threshold Board was seeking to determine which FS-1 level officers should be promoted".

Grievant's Position

Grievant asserts that his 1983 EER was the most critical document to be reviewed by the 1983 Selection Board in their consideration of his promotability. He states that it was received in PER/PE on May 31, 1983. This allowed ample time, he says, for it to be properly inserted in his file before the 1983 Selection Boards began their work on July 13. However, he states, the 1983 EER was missing from his file without explanation for most of the period in which the Selection Board was sitting. He says that the first weeks of the Selection Board's deliberations were critical in the review process; that it was during this time that the Board was conducting its first screening to determine which files would be given a detailed screening as

opposed to those files of officers who would be mid-ranked. He asserts that Block, the director of PER/PE, corroborated this contention when he testified that "it is absolutely critical" that files be complete and in proper order so that there is a fair and adequate review of officers in competition for promotion. He alleges that as a result of the loss of his 1983 EER he was not given the type of first screening he would have had but for the Department's error. He further complains that he was never told that this EER was lost. In sum, he contends that PER/PE failed to meet its responsibility to ensure that his complete file was submitted to the Selection Boards in a proper and timely manner. He claims that this failure severely prejudiced his opportunity for promotion.

Department's Position

The Department admits that grievant's 1983 EER was lost after its receipt in the

Department and asserts that it was not subsequently found. It explains that the file room receives thousands of documents and from time to time documents are lost. Part of the problem, according to the Agency, is that a great number of evaluation reports are received immediately before promotion panels convene. The grievant's EER was received as of May 31, the agency says. The Agency believes that if it had been processed in the usual manner, it would have been sent to the central file where personnel would have placed it in grievant's performance folder.

The Department declares, however, that although grievant's report was missing during the first weeks of the Selection Board's deliberations, a cable copy was obtained from the post and placed in grievant's file in sufficient time to be considered by the Board inasmuch as the Board was in session until mid-September. The Agency explains that the telegraphic version was date-stamped in the

Department August 10, 1983, 3 1/2 weeks after the panel convened, and was then placed in grievant's performance folder. The Department argues that it is not prejudicial that all performance folders are not before Selection Boards when they first met; that Boards are familiar with the procedure whereby additional files will be continually put before them; and they are aware of the fact that not all files are available the day they first convene.

There were hundreds of folders of members of grievant's class to be reviewed by the 1983 Board, the Department states; not all of them could have been read during the first weeks of the Board's deliberations. According to the Agency, the Selection Board Chairman is advised in those instances when an incomplete file is made complete and becomes ready to be reviewed. In sum, the Department insists that an employee whose file is reviewed toward the end rather than at the

beginning of the review process is not prejudiced by this circumstance.

Discussion and Findings

At issue here is the degree of damage, if any, which the loss of the EER may have caused. Taking into account the fact that the Selection Board was in session for an additional month after grievant's cable EER became available to it for review, and on consideration of the Selection Board review process described in the record, we find that grievant's claim that he was prejudiced in the promotion process as a result of the lost EER is not convincing.

We find persuasive the Department's argument that hundreds of files of members of grievant's class were before the 1983 Selection Board at the time it convened and that all of them would not have been acted on during the first

weeks of the Board's deliberations. There is no showing that the review of grievant's file later in its session caused the Board to view it any differently from those reviewed earlier.

On the basis of the evidence before us, we are not persuaded that because his file was not acted upon in the first weeks of the Selection Board review it therefore did not receive fair and adequate consideration. Although the Department's failure to have his EER in his file at the time the Selection Board began its work is an obvious deficiency, grievant has not established that he was damaged thereby in the promotion process.

(b) "The cabled 'copy' of Grievant's 1983 EER that was inserted in his Official Performance File approximately one month after the Senior Threshold Board was convened was seriously defective."

Grievant's Position

Grievant says that at the time he returned to Washington from Geneva on September 19, 1983, he asked to see his performance file. Instead of the normal EER for the 1982-1983 rating period there was a cabled copy in his file. He had not been told of the loss of the original EER, he complains, and thus didn't understand why the cabled EER was there. He states that he later learned that the cabled version was inserted in his file in mid-August -- approximately one month after the Selection Boards began to review the files of FS-1 officers to determine promotees and approximately two weeks before they were scheduled to conclude their work. He complains also that the cabled version was not in the prescribed format and thus was not readily comparable with the EERs of other officers in his competition group. He says that there was no signature or other marks on it to attest to its authenticity. He asserts that the Selection Board had a difficult task in determining the most promotable among 147 class 1 economic

officers by September 1 and continued their work beyond that date.

Also, he avers, part of the telegraphic version was "garbled" in that two paragraphs in Part VI, Rated Officer's Statement, were transposed to a different section and part of a sentence from Part VI was dropped. Consequently, he says, it was not clear exactly where the transposed comments fit in the report. He holds that the garble and omission were confusing, significantly reduced the meaning of the EER, and hindered a proper Selection Board review. Grievant states that PER/PE has a responsibility to review all incoming EERs to identify garbles or other errors, and yet nobody caught the errors.

Department's Position

The Agency says that when it was determined that the grievant's original EER could

not be found, it requested Geneva to cable a replacement copy. Posts keep a duplicate of the original EER on file, the Department explains, and it was from that copy that a cable was prepared. The Department contends that the grievant's EER in cable format is easily compared to EERs in the usual format. It claims that a comparison of the original text of the EER with the telegraphic text shows that the telegraphic version did not significantly reduce the meaning of the original.

Regarding the grievant's complaint that he hadn't been notified that the original EER had been lost, the Department submits that it would be normal to include a cable EER replacement in an employee's file without notifying the employee. The assumption is that a telegrpahic version is an accurate copy. The Agency states that if there is time for a copy of the report to be pouched by the post, that dupliicate would be placed in the

employee's file. Otherwise, the telegraphic version serves as the replacement.

Discussion and Findings

The Agency should have detected the flaws in the telegraphic version before it was placed in grievant's file. However, grievant has not demonstrated that those flaws in any way affected the evaluation sections of the report or obscured the sense of other parts. The fact that there are some passages that are out of place is obvious to the reader. We are not persuaded that the Selection Board, which had many other EERs before it, was confused by the relatively minor differences in the cable copy and was unable to review it properly.

Regarding grievant's contention that he was not notified that a telegraphic version of his EER was being substituted for the original, we

believe that such notification would have been appropriate. There is no showing, however, that this was a requirement imposed by regulations, or that the failure in any way damaged the grievant.

(c) "Two improper briefings may have prejudiced the Senior Threshold Board's Consideration of grievant's promotability."

Grievant, while on home leave in mid-July 1983, requested early notification concerning his ranking by the Selection Board in order to facilitate his departure from Geneva if he were not promoted. At the time he spoke to personnel officials about this, he says, they told him that it was their expectation that the Selection Boards would conclude their work by September 1. He asserts that he was told on September 1 that he had not been promoted, but some time later he learned that the Selection Board had not finished its work until September 13.

Grievant contends that two improper briefings were given to the Selection Board by the chief of PER/PE, in that he: (1) discussed grievant's promotability approximately two weeks before the Board had concluded its work; and (2) discussed deletions of certain inadmissible comments which had already been seen by the Board. By discussing his promotability, grievant argues, the Chief of PER/PE, in effect, obtained an improper commitment from the Board's Chairman that precluded further consideration of his promotability during the critical final days of the Board's deliberations. Grievant also argues that it was improper to discuss deletions of inadmissible comments in the EER with the Board because the precepts catregorically state that "any information in the file which is currently inadmissible . . . should not be the subject of discussion . . . ." Grievant concludes that while it probably cannot be established whether or not these admitted meetings

prejudiced lthe Board, they could have and, in any event, they were unquestionably improper.

Department's Position

The Department admits that Block, the Chief of PER/PE, did have discussions with members of the Selection Board on two occasions concerning their review of grievant's file. The Agency claims that the first meting, at the end of August, resulted from a direct request from grievant, while he was again in Washington late that month, for an early, informal notification as to whether he was recommended for promotion by the Selection Board. Such notification, the Agency claims, was sought by grievant so that he could arrange to wind up his affairs in Geneva by September 30 if that became necessary. The Agency admits that it does not customarily provide such advance information to members of the service because a Board's findings could be revised at any time up to the time the

Board's report is accepted by the Director General. However, it did so in this instance only because grievant requested it and only after the Board had completed its deliberations regarding grievant.

The second meeting, the Agency says, concerned statements in grievant's EER which were inadmissible and which by regulation it was required to remove. The Agency contends that these discussions had no bearing on grievant's promotability because they both occurred after the Board had completed its determination with regard to his ranking.

Discussion and Findings

It is clear from the precepts to Selection Boards that the Director of PER/PE is authorized to brief the Boards on matters pertaining to its operations. At the time of Block's first meeting with the Selection Board, just prior to September 1,

it had already had grievant's file before it for several weeks. Within that period, the evidence shows, the Board mid-ranked the grievant in competition with his peers. The process by which the rankings are made is described lin the record essentially as follows:

There are basically two screenings. The first is to determine which employees are considered qualified for promotion and which are to be subject to low-ranking. The group which is in neither the recommended for promotion category or the low-ranking category is considered mid-ranked. On completion of that initial screning the mid-ranked employees are not considered further.

The agency submits that given the above process, the Selection Board had completed their consideration of grievant's ranking or it would not have been in a position to inform Block that

grievant was included in the mid-rank category. In this connection Block testified:

> . . . insofar as Mr. Harter's competition groups were concerned, they had completed their deliberations . . . . I was told by [the Selection Board Chairman] that Mr. Harter was not recommended or reached for promotion.

This testimony has not been contested, and there is no credible basis for believing that the Selection Board would have conveyed this information to Block unless it had made a final determination as to grievant's ranking.

Regarding Block's second meting with the Selection Board, pertaining to the inadmissible comments, Block appropriately apprised the Selection Board of comments in the EER which by regulation should not have been included. The record in this case contains a statement by the Selection Board to the effect that the Board had already noted in grievant's EER the inadmissible

comments that Block brought to their attention. The statement, which was appended to the final Agency review sent to grievant on September 28, 1983, emphasized that the Board had disregarded the inadmissible material, as directed by the Precepts. Given the facts and circumstances before us on this matter, we find no credible evidence that the two discussions at issue were improper or represent an element of unfair prejudice to grievant.

(d) Deletions of critical portions of grievant's 1983 EER were improperly ordered.

Grievant's Position

Grievant contends that the following comments were improperly deleted from the cabled copy of his 1983 EER (Statement by Rated Employee):

My 1971 grievance hearing -- the first completed one in the history of the State Department -- was generally deemed a "success," but reverberations have continued to affect my Foreign Service reputation. I had to fight for that proceeding. For better and/or for worse, hundreds of Foreign Service employees since that time have had virtually automatic recourse to grievance procedures. Other improvements in the Foreign Service resulted such as the 1972 prohibition against references to spouses in efficiency reports. This followed criticism by my Grievance Committee of a comment in my 1965 efficiency report that my wife spent too much time with our young children in Bangkok.

Incorporated in the same Rated Employee Statement is the following comment quoted from a statement volunteered by the Political Counselor at the post:

"He filed a grievance: what is worse, he won it."

Grievant asserts that he felt that any chance he had of promotion would depend on the Selection Board taking into account his view that his "prospect for promotion had been prejudiced as a

consequence of (his) 1971 grievance proceeding." He further asserts that Foreign Service regulations require that the employees concerned should be informed whenever any such deletions are ordered; and that the concurrence of rated officers will be sought when any substantial changes in an evaluation report are to be made. Grievant claims that the Department violated this regulation because he was not informed of the deletions until after he filed his grievance on September 23 and, even then, only as a consequence of his own discovery investigations.

Department's Position

The Agency states that grievant included statements in his EER which were inadmissible. The Agency cited certain portions of its regulations (3FAM527) which state, in part:

a. Inadmissible comments may not be included in any section of the evaluation report (including the rated member's comments) . . . .

b. If PER/PE discovers inadmissible comments in evaluations reports, it will make deletions or substitutions and inform the members concerned. Concurrence of the rating and rated members will be sought where any substantial changes must be made.

c. The following subjects are inadmissible in any part of the report either as direct or indirect comments: . . .

(4) . . . references to spouse or family . . .

. . .

(6) Grievance . . . proceedings; . . .

The Agency thus concludes that it is clear from this regulation that a rated employee cannot determine that inadmissible comments are to be included in an EER.

According to the Agency, grievant was notified in a cable to Geneva on September 9, 1983, that the inadmissible comments were being deleted from his EER. The Agency states that it did not discuss the deletions with grievant beforehand because it believed that they were not "substantial." A further reason given was that the removal occurred late in the evaluation process when there was not time to obtain concurrence and still apprise the Board of the deletions in a timely manner.

Discussion and Findings

Grievant does not dispute the Department's determination that his EER contained inadmissible comments, or its authority to expunge those comments. Grievant's claim, essentially, is that by regulation the Department should have sought his concurrence for the "substantial" change that was effected in his EER.

It is apparent that the Department intended by its September 9 cable to Geneva that grievant receive early notification of the deletions made in his EER. In our opinion, the Department did not act improperly in not seeking grievant's concurrence before making the deletions. The record indicates that it was in grievant's behalf, in the first instance, that information was conveyed to the Department to the effect that his EER contained inadmissible material. The record suggests the strong likelihood that grievant had reason to know that upon verification of the information furnished, the agency would direct that the inadmissible material be removed from the EER. In the final analysis, the agency had no choice in the matter but to expunge the inadmissible comments. Hence, grievant's argument that his concurrence for the change should have been sought is not persuasive.

C. Substantive Defects Alleged in Grievant's 1983 EER

1) "The 1983 EER contained inaccurate, unsubstantiated, and falsely prejudicial statements."

Grievant's Position

Grievant claims that a statement commenting on his managerial skill is false, and that comments on the need to edit his drafts and oversee his work were false. He asserts that deletion of portions of the EER, as proposed by the Department in its final Agency review of the grievance, is insufficient remedy because the statements in question had already been seen by the Selection Board before it decided not to recommend him for promotion.

Department's Position

The Department agrees that the comment on managerial skill is misleading and has offered to remove it. It notes that the statement on the need

to edit grievant's drafts is unsupported by examples and has offered to remove it. It contends that the protested comments and a related passage in Part IV of the EER are minor parts of the Report whose deletion would have only negligible effect on its overall impact.

Decision and Findings

Grievant has asked the Board to determine whether the comments at issue may have been a substantial factor in his non-promotion. The contested items are the portions underlined below:

1) Part III, Evaluation of Performance, B. 3.

Mr. Harter manages an extremely heavy and varied workload and turns out a very high volume of work. He might, however, have been able to moderate this workload by making more effective use of the junior officer assigned to him half time.

2) Part III, B. 4.

He writes quickly and voluminously. Although this usuallyrequires considerable editing, his frequent and timely drafts provide a useful framework upon which I frequently build in order to provide Washington agencies with a composite product that is factually and analytically complete.

3) Part IV, Evaluation of Potential, B, fourth paragraph

At the same time, his work still needs oversight, partly for the reasons noted in Section IV.C. below, and partly for those alluded to earlier.

Section IV.C., which grievant has not contested, states:

There is one area in which improvement could, in my view, have a positive impact upon a wide range of Mr. Harter's work. He should try to become a more discerning and critical listener; he tends too often to hear what he expects or wants to hear, or to accept the words of his contacts at face value rather than probe for their real meaning.

We have carefully examined the underlined passages against the full EER. In relation to the report as a whole, the comments that are proposed for deletion are mildly critical at worst and, in our opinion, do not detract significantly from the very favorable EER, which includes these descriptions:

- Mr. Harter is one of the hardest-working officers I have ever known. Since his arrival in Geneva he has consistently put in 50 and 60-hour weeks, even coming to work at times during his vacation period.

- His energy and facility for dealing with several issues simultaneously are extraordinary.

- He has served commendably as a member of U. S. delegations -- occasionally the sole member -- to highly technical and politically significant meetings concerned with, inter alia, transfer of technology, shipping, and the management of UNCTAD as an institution.

On anaysis of the record we find that grievant has not shown that the contested comments were a substantial factor in his non-promotion.

The Department has offered to make the modifications in the EER that have been shown in the foregoing. We are confident that the proposal will be implemented upon grievant's request to the Department that material delineated above be removed.

2) "The 1983 EER did not reflect the real nature and impact of grievant's contribution during the rating period."

Grievant's Position

Grievant contends that the EER failed to evaluate his accomplishments in several fields and failed to note his unusual political sensitivity.

Department's Position

The Department contends that both the rating officer and the reviewing officer commented on a variety of grievant's duties. It claims the

grievant's work requirements were set out in priority order as required and all of grievant's major responsibilities were commented on. It claims the EER was comprehnsive and virtually all available space was used to comment on grievant's performance. In this regard the Agency points out that the rating officer adhered to the following instruction in 3 FAM 521.6a:

> Written comments on any evaluation report may not extend beyond the space allowed . . . . Ordinarily, only rated members and review panels may use extension sheets. PER/PE will return reports which violate this restriction. . . .

Discussion and Findings

In appraising the merits of grievant's position, we have examined the EER particularly from the standpoints of performance rating instructions and of possible prejudice to grievant. The rating officer is instructed by 3 FAM 522.2d to evaluate the employee's work, essentially against

the responsibilities and priorities contained in the Work Requirements statement in Section II A of the EER. This statement is established jointly by the rating officer, the reviewing officer and the employee. There is no indication in the record that grievant did not agree with the Work Requirements set forth in his EER. In our judgment, the rating officer reasonably focused his appraisal on the way grievant carried out the stated requirements of the position. The fact that he did not include additional material that grievant believes was warranted does not render the report defective. Given the admitted "essentially laudatory character" of the report, it is questionable whether additional favorable comments on aspects of grievant's work not covered, would have significantly added to its impact. Also, the rating officer properly did not go beyond the space allotted lin the rating form for his evaluation.

Part VI of the report, Statement by Rated Employee, provided grievant an opportunity to describe his "most significant achievements" in the rating period and to add any other comments about his performance which he felt "should be highlighted or may not have been addressed as you wished" by the rater or reviewer. 3 FAM 523, on Responsibilities and Rights of Rated Members, says in section c. that an employee has a right "To include in the evaluation report one's own views of the job and performance and, if desired, one's comments on the evaluation and on career prospects, training, and assignment preferences." In his statement grievant expressed his disappointment that the evaluation report "does not reflect the real nature and impact" of his contribution, and he described what he considered to be his most important achievement.

Given all the foregoing on this matter, as well as related material in the record, we are not

persuaded that the 1983 EER, including the Reviewing Officer's Statement, is flawed by omissions that violate the rating instructions or are unfairly prejudicial to grievant.

3) Evaluation of Potential

An allegation that originated in grievant's testimony during the hearing is the contention that Section IV of the EER, Evaluation of Potential, does not contain a meaningful evaluation of his potential for assuming greater responsibilities in the Foreign Service. This section, he argues, is the principal basis for the Selection Board to determine whether an officer merits promotion.

Grievant's contention, in our view, is not borne out by an objective examination of the section in question, which appears overall to be very favorable. For example, the rating officer affirmed that grievant's performance during the

ating period "plus such personal characteristics as is energy, drive, and wide range of interests, all ttest to his capacity for further growth." The ating officer backed this description with his pinion that grievant "has potential to perform ffectively at higher level." We are persuaded that ne evaluation of grievant's potential satisfies the nstructions for the preparation of that section of ne EER.

4) "The Review Statement was tainted and efective."

Grievant's Position

Grievant claims that the rating officer ought to prejudice the reviewing officer's udgment on the substance of the EER by nisrepresenting grievant's objections to the rating fficer's comments in the EER.

Department's Position

The Department claims that grievant empted to pressure the rating officer to write an R which would not have been accurate and fair. e rating officer, it contends, became concerned out the attempted pressure and prepared moranda for the files of his conversations with evant about preparation of the EER. He also, he tified, sent copies of the memoranda to the iewing officer. The Department contends that no s was introduced into the EER by either the rater the reviewer as a result of the memoranda.

Discussion and Findings

Grievant had told the rating officer of his cific objections to the 1983 EER while it was still draft form. Grievant's complaint goes to the tter of some six memoranda that the rating icer prepared in connection with grievant's

discussions with him about the EER. In the circumstances stated in the record, we find no impropriety in the decision to make a record of those discussions. Also, we do not consider the rating officer's transmittal of those memoranda to his superior, the reviewing officer of the EER, to be improper. 3 FAM 522.1 c. reads:

> Rating and reviewing officers may discuss the member's performance and the Performance Evaluation Report, but their individual comments must reflect their own separate and independent views.

Grievant has not demonstrated that the memoranda are not truthful, or that the reviewing officer relied on them in preparing the review statement. In our judgment, no injustice was intended by the preparation and transmittal of the memoranda at issue, and none resulted.

Summary of EER Issue

The crux of the Board's findings and conclusions concerning the issue of the 1983 EER is that some deficiencies surrounding the substance and handling of that performance report are apparent.

However, the grievant has not established that those deficiencies breached the 1980 Settlement Agrement. Further, these deficiencies have not been shown to be so serious as to warrant removal from his file of the 1983 EER. The preponderance of the evidence indicates that these deficiencies were not a substantial factor in grievant's non-promotion. We note in this regard grievant's testimony to the effect that he competed with 147 economic officers in his class, of whom five were reached for promotion in classwide competition and five in the separate competition among economic officers.

IV. BOARD DETERMINATION

For the reasons explained in the foregoing, the grievance is denied.

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

John J. Harter, Grievant

and

The Department of State

Record of Proceedings No. G-83-106-State-68

Date: January 29, 1987

For the Foreign Service Grievance Board:

Presiding Member: Jerome H. Ross

Board Members: Geraldine Sheehan

Stanley J. Siegel

Special Assistant to the Board: James B. Riley

Representative for the Grievant:

Frances J. Chetwynd

Attorney for Grievant

Representative for the Department:

Stephen M. Block
Director of Grievance Staff

Exclusive Representative:

American Foreign Service Association

I. THE GRIEVANCE AS REMANDED

This grievance is before the Foreign Service Grievance Board on remand from the United States District Court for the District of Columbia (John J. Harter v. United States of America and George P. Shultz, Secretary of State, Civil Action No. 85-1086, January 31, 1986). It had been considered previously by the Board as Record of Proceedings No. G-83-106-State-68, and a decision was issued March 8, 1985. In that decision the Board denied the grievance after finding that a 1980 Settlement Agreement between Harter and the Department had not been breached and that various procedural and substantive deficiencies relating to his 1983 selection board competition had not unfairly prejudiced him in the promotion process. Harter's failure to be promoted that year caused his separation through expiration of maximum time in class.

On appeal, the court upheld the Board's decision on all issues but one. That issue concerned the possible prejudicial effect of misleading or erroneous comments in the 1983 evaluation report which the Department had acknowledged should have been deleted. The court found that these comments may have been a substantial factor in the Department's failure to promote Harter; it said the reasoning offered by the Board in rejecting Harter's prima facie showing concerning these comments was not supported by substantial evidence. Consequently, it remanded the matter to the Board with instructions to consider whether the Department has carried its burden of showing that plaintiff would not have been promoted even in the absence of these critical comments and to determine what relief, if any, is appropriate.

II. PROCEEDINGS BEFORE THIS BOARD

A panel of the Board convened a meeting March 11, 1986 to hear the views of the parties relative to the implementation of the court's order. On March 13, 1986 the Board asked the Department to submit evidence within 45 days on the question of whether grievant would have been promoted but for the comments the Department had offered to delete from the EER.

On March 12, 1986, grievant renewed an earlier request for interim relief; he sought reinstatement retroactive to the date of his separation, with full back pay and benefits. His initial request for interim relief, in September 1983, had been denied by the Department and then by the Board. The Board turned down his renewed request on June 27, 1986. In that ruling, we noted that our interim relief authority serves to preserve the status quo until the grievance is resolved by the Board; we said that aim could not be met when the employee has, like Harter, been off the rolls for two

and one-half years. We pointed out that even had we decided favorably on interim relief when the question was first posed, the relief would have ended -- and Harter would have gone off the rolls -- with the issuance of the Board's decision on the merits in March 1985. That is because an agency action can be suspended only until the Board rules on the grievance.

Grievant filed interrogatories to elicit information that would permit him to compare his own record with that of the Foreign Service officers who were promoted with him in 1971 and of those who entered the service with him in 1954. He sought details on their promotions in subsequent years, on their education and training, assignment history, language qualifications, etc. The Department objected to providing the information, and in a meeting with parties April 18 argued that a comparison with others' promotion records is not relevant to the issue. Grievant cited court rulings in

Reiner* and Erhman** to show that a statistical comparison with the promotion record of peers over time is the appropriate method to determine what would have happened in 1983 absent the flaws in the EER. The Board ruled that the only suitable comparison was with officers who had been competed with grievant by the 1983 selection board. We held that no other group would be relevant to the question of how grievant would have fared before that board had his most recent EER been in order. We found that the circumstances in Reiner and Ehrman were not parallel to those in this case since in the earlier cases the grieved errors had persisted for years, whereas the error in the case at hand was seen by only the 1983 selection board. Subsequently, grievant filed similar interrogatories concerning

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* Reiner v. United States, 686 F. 2d 1017, 1021 (D. C. Circ. 1982)

**Ehrman v. United States, Civil Action 82-1984 (U. S. District Court D. C., vacated and remanded as compromisedl and settled May 17, 1984)

individuals who had been recommended for promotion in 1983, and this Board ordered the Department to answer most of them.

To produce evidence as to whether grievant would have been promoted in 1983 had his file been in order, the Department reconstituted a selection board. After removing from grievant's 1983 EER the comments it had earlier agreed to delete, the Department placed before the board the amended file, together with files drawn from the bottom of the promotion list that year. The reconstituted board ranked grievant below the last promotee.

III. DISCUSSION AND FINDINGS

Harter, who had been in the Foreign Service since 1954, was an FS-1 economic officer at the time he was mandatorily retired in 1983. From August 1981 until his retirement he was assigned

to Geneva as an international economist, with responsibilities as the chief resident U. S. negotiator at the United Nations Conference on Trade and Development (UNCTAD). It was the final evaluation report he received for his work in Geneva that contained the critical comments that the Department, following Harter's grievance, agreed to delete and that the court found may have been a substantial factor in his non-promotion.

Grievant claims that in amending his file for review by the reconstituted board following the court's remand, the Department should have deleted additional words, not just those it had previously agreed to delete. He objects that the reconstituted board procedure is experimental and not fully tested, and that it was flawed and tainted. He asserts that the only way the Department could carry its burden is to compare his record with the records of those recommended for promotion in 1983. He contends that the number of files

considered by the reconstituted board was too few to provide a reasonable basis for determining his relative performance. He asserts that he was recognizable to the board as a grievant and that the chairman of the reconstitute panel was not impartial. He claims that his grievance significantly parallels Ehrman v. United States and that, like Ehrman, he is entitled to relief. He also asks this Board to reconsider two of the issues he had raised initially which the court subsequently dismissed -- the uncertainty of the date on which a cabled copy of his EER was placed in his file and the fact that a personnel officer twice discussed that file with the selection board.

The Wording To Be Deleted from the EER

Grievant contends that when the court in its remand order held that certain comments in the EER had possible prejudicial effect, it was referring

not only to the wording the Department had earlier agreed to delete, but to additional phrases as well.

The record before the court showed that the Department had agreed to delete two full sentences plus the underlined words in the following sentence, which appears in the EER's Section IV -- Evaluation of Potential:

> At the same time, his work still needs oversight, partly for the reasons noted in Section IV.C. below, and partly for those alluded to earlier.

Grievant claims the court intended deletion of that entire sentence.

The court's finding (slip op. No. 85-106, pp. 6-7) reads as follows:

> The troublesome issue concerns the possible prejudicial effect of misleading or erroneous comments in the 1983 EER relating to Harter's potential for promotion which the Department has acknowledged should have been

deleted. Grievance Board Dec. p. 24-27. The 1983 EER gives a very favorable, sometimes glowing evaluation of Harter's abilities and service to the Department but stops short of recommending him for promotion. The rating officer made four mildly critical comments, three of which the Department, subsequent to the Selection Board's decision, offered to delete. These comments included a negative comment on Harter's potential for promotion which incorporates the other critical comments. After these comments are deleted there are only a few other statements directly addressing plaintiff's potential for promotion, all but one of which were favorable.

The Grievance Board concluded, however, that in light of the generally favorable statements in the EER the deleted criticisms that were presented to the Selection Board were not a substantial factor in the decision not to promote Harter . . .. Plaintiff carried his initial burden of showing that these comments may have been a substantial factor in the failure to promote him. Reiner v. United States, 686 F. 2d 1017, 1021 (D. C. Cir. 1982). The reasoning offered by the Grievance Board in rejecting plaintiff's prima facie showing was not supported by substantial evidence. (Emphasis added.)

It is clear to us that the court is referring to the wording the Department had already agreed to

delete. This is plain from the phrase in the first paragraph above, ". . . comments. . . which the Department has acknowledged should have been deleted," and from the phrases in the second paragraph above. "The Grievance Board concluded . . . the deleted criticisms . . . were not a substantial factor . . ." and ". . . these comments may have been a substantial factor. . ." We conclude on the basis of the above that the court was not making an independent judgment as to which comments in the EER were falsely prejudicial. Rather, it was saying that certain comments the Department had agreed to delete, which this Board had found to be not a substantial factor in Harter's non-promotion, may indeed have been a substantial factor. The remand followed so as to determine whether the Department could show that grievant would not have been promoted even absent those comments.

We are persuaded that in deleting only the wording it had earlier offered to delete, the

Department eliminated from the EER the flaws that had given the court concern as to their possible prejudicial effect.

The Reconstituted Selection Board

Grievant charges that the reconstituted board procedure is experimental and not fully tested.

The use of reconstituted boards developed in response to the court's decision in Reiner, which emphasized the shift in the burden of proof once a grievant has established that an error had been committed and that it was a substantial factor in a subsequent agency action. The decision said the agency was then required to show that it would have taken the same action even in the absence of the error.

Subsequently the Department tried various means to bear this "but for" burden: In 1983, the Department itself compared grievants' files with the files of others (but it lost before this Board when it then claimed that that review proved it was unlikely the grievant would have been promoted even absent the error), and in one case it passed to this Board for review the files of the officers with whom the grievant had been competed originally (it won that case here, but the employee organization, which represented the grievant, filed an appeal, which is still pending, protesting that this Board had usurped the function of selection boards).

In 1984, the Department took a different tack. It reconstituted selection boards to consider the file of a grievant who for three years had not been competed before the appropriate selection boards. In each review, the reconstituted boards ranked the grievant below the last of the actual

promotees. In our decision, we stated that we fully endorsed the use of reconstituted boards as a means for agencies to obtain evidence to be weighed along with other evidence in their effort to meet the burden of proof under Reiner. Our decision pointed out that the selection board process is the statutory mechanism for promotion in the Foreign Service and that the process, even in its imperfect reconstituted form, is a much fairer way to determine promotability than is a decision by management alone.

In subsequent Reiner-rule cases, this Board, mindful of the possibility of reconstituting selection boards, and in the interest of eliciting the best available evidence, has separated the issue of promotion from the issues of error and substantial factor. Once a grievant has proved the latter two, we have called for a second stage and asked the Department to produce evidence on the promotion issue. Grievants have been offered a chance to

respond. Given the time and expense involved in reconstituting boards, a second stage has been considered justified as a practical matter, and necessary in cases where the extent of the error must first be determined.

The record in the cases that have come before us indicates that agencies have taken care to structure reconstituted boards in accordance with the rules for regular boards: Public members are included, as required of selection boards by the Foreign Service Act; and regulations have been followed in the selection of officers of the appropriate grade and functional specialty to serve as members. Some agencies have reconvened the members of the original board. The State Department says it always includes a woman and a minority representative on such boards. Members have been sworn and instructed to follow the negotiated precepts that governed selection boards for the year in question.

The Department says it has used reconstituted boards in 17 grievances to date -- other agencies have added to the total -- and in seven of these cases the grievant was promoted as a result of the reconstituted board action. (Some of these cases were grievances that were still at the agency level; when the reconstituted board outcome was favorable to the grievant, a settlement agreement was reached.)

In the two years that have passed since the first use of reconstituted boards, nothing has caused us to change our judgment that they represent the most acceptable way to place aggrieved members as nearly as possible back into the competitive setting they would have been in but for an agency error. We consider their use well past the experimental stage.

In rejecting the reconstituted board as a means of showing how he would have fared absent the errors in his 1983 EER, grievant asserts that the only way the Department could carry its burden is to show, by a comparison of his record with the records of those recommended for promotion in 1983, that others exceeded him in the performance characteristics identified in the board's precepts as "decision criteria for promotion" - substantive knowledge, leadership qualities, and managerial, intellectual and interpersonal skills, and in out-of-agency assignments, training, and geographic diversity in assignments. Presumably he would have this comparison done by the Department and, if the outcome there were unsatisfactory, by this Board.

It is exactly such a comparison that was done by the reconstituted selection board -- although not with all who were recommended for

promotion, but only with the lowest ranked of those who actually achieved promotion.

The question at issue is not only whether grievant meets the qualifications set out in the precepts. That much would only make him eligible for promotion -- that is, put him among those recommended by a selection board. But promotion opportunities seldom are sufficient to include all who are recommended, and those below the promotion cut-off line are left by the wayside as surely as if they had not been recommended. It is necessary to determine where grievant's performance ranks in comparison with those actually promoted.

Such a rank ordering requires examination of the performance file of the grievant and the performance files of at least the lowest names on the original rank-order list of promotees. It cannot be achieved simply by comparing

computer printouts that indicate assignment and training patterns, promotion records and language competence (such as those grievant has entered in the record). The degree to which officers meet the precepts' criteria for promotion emerges only in EERs as raters describe their subordinates' performance. It is these descriptions in the Official Performance File of each individual that must be examined in order to rank order competitors for promotion.

That examination and the determination of whether File A is stronger or weaker than File B in the areas of the promotion criteria are most reliably done not by Department management and not by this Board, but by a mechanism that resembles as closely as possible the selection boards that are mandated in the Foreign Service Act.

The detailed comparison grievant calls for of his qualifications with those of his 1983 competitors -- or at least with the most critical fraction of them -- was done by the reconstituted selection board, the body most competent to do it.

The Number of Files Competed

Grievant asserts that the small number of individuals whose files were competed by the reconstituted selection board gave that board too limited a view of his relative performance. He cites the wording of our decision in the 1984 case in which a reconstituted board was used for the first time. That board compared the grievant's file with the files of the two officers who had been promoted one year, and with the file of the sole officer who had been promoted another year. In our decision we remarked on the paucity of files involved -- an unnecessary abridgment given the scant handful of files that constituted the total group competed in

that grievant's specialization -- but found for the agency nonetheless.

Harter's corrected file was placed before the reconstituted board with the files of five others -- the last three individuals on the rank-order list of promoteeslin classwide competition and the last two individuals on the rank-order list of promotees in functional (economic) competition. Those five names had placed just above the cut-off line of available promotions in the original competitions.

Regular selection boards divide competitors into those it recommends and subsequently rank orders and those it does not recommend, who are then placed alphabetically in the mid-rank zone. In the 1983 review of Harter and his competitors, of the 526 files examined in the classwide review, 32 were recommended for promotion, but promotion opportunities were limited and only the top 24 of the rank-order list were reached and actually

promoted. Of the 147 files examined in the functional competition
--- they had already been examined in the classwide review -- 43 were recommended, but promotion opportunities extended to only the first five on the list. Harter was not recommended for promotion in either competition, and fell into the mid-rank zone.

However, for purposes of the reconstituted board, grievant was considered as if he had been recommended, and the board was asked simply to rank order the files before it. The reconstituted board's first review was intended to serve as classwide competition. It considered the files of the five promotees plus grievant's. The two economic promotees were ranked first and fifth, and the three classwide promotees second, third and fourth. Grievant placed last. Then the board conducted a second review intended to serve as the functional competition among economic officers.

Following the practice of regular selection boards, it eliminated from the functional competition the file that had been given first place in the "classwide" competition -- the first three in the rank order in that competition were considered to be already "promoted" as a result of the review -- and competed grievant against the sole remaining economic officer. Grievant was ranked below him.

It is true that additional files might have given a broader view of grievant's relative performance, but that would not necessarily have been to his advantage. For purposes of the reconstituted board, grievant was treated as though he had originally been recommended and had ranked just below the promotion cut-off line, but the fact is that he had not been recommended but fell among the hundreds who were mid-ranked. In the smaller economic competition before the original board, 38 individuals were recommended but not reached for promotion; all of these had

placed higher than even the best of those who were mid-ranked. Had the recommended-but-not-reached files from below the promotion cut-off line been added in the reconstituted board review, or had files been added from the mid-rank group, it would have served only to show how grievant would have been placed among others who had not achieved promotion.

The central question is whether or not his corrected file could edge out at least the last individual to gain one of the limited number of promotions. We believe the reconstituted board's results are convincing evidence that grievant, even after elimination of the errors that gave the court concern, could not compete successfully with the lowest-ranked promotees from the original competition.

Grievant's Identifiability

Grievant states that it is virtually inconceivable that members of the reconstituted board would not have spotted his file as that of a grievant, and that in these circumstances it was probably inevitable that they would rubber stamp the original 1983 ranking. However, we have no way of knowing whether, in fact, his file was recognized as that of a grievant; in any case, we are conscious that members swear an oath to apply the precepts without prejudice or impartiality. The precepts call for decisions made "solely on merit with absolute fairness and justice."

There appears to have been a fair and just basis -- without regard to his status as grievant -- for ranking Harter below those promotees who had emerged as part of the top 4 percent of the 526 officers competed classwide or part of the top 2 percent of the 147 officers competed in the economic function. Grievant had gone unpromoted for 13 years before the flawed EER in 1983 raised

questions about the outcome that year. As grievant argues, this fact may have been a clue to the reconstituted board that he was the grievant. But it is also a telling indication of the lack of competitiveness of his file as assessed by annual selection boards up to that point. And the reconstituted board was judging him not on the 1983 EER alone but on his file as a whole.

Objectivity of the Reconstituted Board Chairman

Grievant charges that Ambassador Charles W. Bray III, who served as chairman of the reconstituted board, was biased against him and had "long held and publicly expressed personal opinions" regarding him.

To support his charge, he submitted part of the transcript of Bray's press briefing on behalf of the Department on January 25, 1972 and an

article that followed in The Washington Post the next day. Bray at the time was assigned as the official spokesman for the Department, and he met with the press daily in on-the-record briefings.

At the January 25, 1972 briefing, Bray announced that the nomination of the then Director of Personnel as ambassador was being withdrawn, and when questioned by a reporter he volunteered that the proposed ambassador had been "attacked in testimony [in Congress] in open session by a very few former employees of the Department and I believe several employees still on active duty." He did not identify them.

The Post article the following day identified Harter as one of two active-duty employees who had criticized the Director of Personnel in testimony before the Senate Foreign Relations Committee. It quoted "a State Department spokesman" as volunteering criticism of the officers

in these terms: "It was certainly inappropriate and unprecedented for current employees to attack a presidential nominee." Grievant calls the article a "deliberate and provocative plant" by Bray and says it damaged his reputation in and out of the foreign service at a very critical stage of his career.

In response to greivant's charge, Bray asserts in a sworn statement that when he assumed the chair of the reconstituted board in 1986 he had no recollection of the content of the 1972 press briefing, and that, in any case, the views he expressed in that briefing were, by definition, not his own since the official spokesman of the Department never expresses a personal view in the daily briefings. He says that fact and the fact that he did not identify Harter by name in the briefing argue against any inference of personal bias on his part against grievant. .Bray suggests that the wording of The Washington Post article indicates a source other than himself for the criticism of Harter

expressed there. Had any bias existed at the time he discovered Harter's file before the reconstituted board, he says, he would have disqualified himself immediately.

We find Bray persuasive when he explains that the Department spokesman speaks from briefing notes preapred each morning by a variety of offices in the Department and that his reply to a reporter's follow-up question "was almost certainly provided to me by the originating office . . . I would not have initiated such a comment on my own authority."

And we find plausible the significance he draws from the distinction between the Post article's attribution of a quoted comment critical of Harter to "a State Department spokesman" -- an attribution that is routinely employed by reporters to describe Department officials at any level who do not wish to be identified by name -- and its direct

attribution to him, by name, of quoted remarks from the press briefing.

Bray adds that, on a personal basis, he was very much a partisan of the pending legislation for which Harter testified in Congress. He says that if he had any bias, it was against the then Director of Personnel who, after Bray took leave without pay to work for a year with the American Foreign Service Association, "took it upon himself to organize an effort to 'exile' me to a distant post abroad in retaliation for my views on the need for reform of the personnel system of the Department of State. . ."

We find that Bray's statements as official spokesman of the Department cannot be held as persuasive evidence of personal bias. Furthermore, grievant has not shown that Bray was the source of The Washington Post article's quoted comment critical of Harter, nor that he inspired any part of that article other than by the comments he made at

the briefing on behalf of the Department. These comments are directly attributed to him by the article. In sum, the evidence does not support a charge that -- 14 years after Bray briefed the press, mentioning unidentified employees -- he took up his duties on the reconstituted selection board with a bias against grievant. His support of the legislation that Harter was defending before Congress and his own sense of grievance against the then Director of Personnel reinforce our finding that there was no personal bias.

Comparison with Ehrman

Grievant claims that his grievance significantly parallels Ehrman v. United States in which the grievant was awarded a triple retroactive promotion to correct cumulative career damage over a period of many years. He says that, like Ehrman, he is entitled to relief.

The parallels grievant asserts are these: Both he and Ehrman established years ago that they had been prejudiced by inclusion of falsely prejudicial material in their files. (Harter claims that a grossly flawed evaluation has remained in his file ever since.) Both won grievances years ago that brought decisions calling for assignment to a competitive position, but no such assignment was made. Both in ensuing years were denied competitive assignments. Both faced maximum time in class and grieved a second time, alleging that the failure to implement the earlier recommendation had handicapped their competitiveness. For both, the second grievance led to a mainstream assignment and an extension of time in class. Both then were victim of new prejudicial material, and their overly long time in grade handicapped them. Both grieved a third time, with Harter urging the Grievance Board to take the prejudicial material into account in the

context of his exemplary performance and the Department's many past errors.

The principal difference between the two cases, he alleges, is that Ehrman's second grievance led to a formal decision whereas he himself agreed to a negotiated settlement.

We find here, as we found when we ruled on Harter's initial interrogatories, that, unlike Ehrman, the case before us is limited to determining the effect of an error committed in a single EER and seen by only a single selection board. We repeat here what we said in our earlier ruling on interrogatories:

Grievant bases his request . . . in part on his assertion that the1983 selection board could have looked at flawed material from an earlier date. But the file that was before the selection board contained no proven errors. What the

selection board saw was what it properly should have seen except for the defective sentences in the 1983 report that are now in question. In urging the need to reach back through the years for a comparison, grievant argues that there is a history of 15 years of his inability to get a fair chance. But if wrongs were committed in the past, they are not before us now. We are limited to the question of whether the 1983 selection board would have promoted him absent the errors in his 1983 EER.

Request for Reconsideration of Two Issues

Grievant appeals to this Board to reconsider two procedural issues that were before us when his grievance was heard initially -- the uncertainty of the date on which a cabled copy of his EER was placed in his file and the fact that a personnel officer twice disscussed that file with the selection board.

The Board denied his claims on these issues, and that finding was reviewed by the court on appeal.

Regarding the late and uncertain date of the presentation of his evaluation to the selection board, the court wrote:

> The Selection Board reviews files that are completed late in the same way as those presented to it earlier. Given this procedure for assuring that files receive fair and adequate consideration, the Grievance Board properly concluded that although the late arrival of plaintiff's EER was an obvious deficiency, plaintiff had failed to show he had been prejudiced by it.

Regarding the personnel officer's discussions of Harter's file with the selection board, the court wrote:

> Plaintiff was not prejudiced by staff inquiries of the Selection Board before it reached a final decision because these inquiries were prompted by plaintiff's efforts to get early notice of the Board's determination and had no relation to the merits.

Given the court's ruling, we believe any reconsideration of those issues by this Board would be inappropriate.

Conclusion

The burden of proof placed on the Department under Board regulations and Reiner is one of preponderance of the evidence, calling for a finding that it is more likely to be true than untrue that Harter would not have been promoted even absent the admitted flaws in his EER.

On the basis of all the above, we find that the Department has met its burden.

DECISION

The grievance is denied.

For the Foreign Service Grievance Board:

/s/

_____

Jerome H. Ross

Presiding Member

/s/

_____

Geraldine Sheehan

Member

/s/

Stanley J. Siegel
Member

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the matter of	)	
	)	
John J. Harter	)	
	)	ROP No. G-83-106-
State-68	)	
	)	
	)	
and	)	
	)	
	)	
	)	
United States Department	)	
of State	)	
	)	
Agency	)	

ORDER

Grievant, who claims he would have been promoted in 1983 but for falsely prejudicial material in his 1983 EER, filed interrogatories March 21, 1986, seeking to learn the professional qualifications and subsequent promotion history of the group that was promoted with him to FSO-3 in

1972. He also sought information on the promotion history of the group that entered the Foreign Service with him in 1954. On March 26 the Department declined to respond on grounds that the interrogatories serve no purpose and are not relevant to the issue at hand. On April 10 grievant asked this Board to order the Department to respond, and asked for an opportunity to explain the relevance of the interrogatories. A meeting with the parties was held for that purpose on April 18. At that meeting grievant argued as follows:

-- No prediction can be made on the basis of a single event. No meaningful comparison is possible if the review is limited to only the individuals before the 1983 selection board because a flawed 1983 evaluation was before that board; therefore one contestant in that race was disabled. In order to come up with a valid basis for predicting the 1983 outcome, it is necessary to go

back in time to find a meaningful group for comparison. A statistical comparison is required.

-- With grievant's entire EER file before it, the 1983 selection board could have looked at flawed material from an earlier date. Even if that earlier material is not part of the ultimate determination, it is part of the route to that determination.

-- The Reiner, Ehrman, and Henderson cases are strong parallels to this case; in Reiner and Ehrman the Court ordered a review of the promotion record of colleagues in the same entering class in order to determine what promotions the grievants were entitled to. Ehrman, like Harter, filed three grievances, and the results were similar. Once in court, a showing apparently was made that the grievant was as well qualified as other officers in his class who had been promoted and better qualified than those who had not been promoted.

-- The Court, when it remanded the Harter case to this Board, pointed out that the burden now is on the Department and indicated that it anticipated a review of the record and a comparative evaluation.

In its decision on January 31, 1986, the District Court denied grievant's various claims -- including claims that related to alleged wrongs in years prior to 1983 -- with a single exception. It remanded the case to this Board on the sole issue of whether the Department of State has carried its burden of showing that Harter would not have been promoted in 1983 even in the absence of critical comments the Department had offered to delete from his 1983 Employee Evaluation Report (EER).

The Court wrote: "The Grievance Board did not purport to be making a comparison of plaintiff with others who were selected for

promotion . . ." (P. 7. Emphasis added.) ". . . but if a comparative evaluation is made on remand the Court suggests that discovery may be appropriate." (P.8.)

It is clear that the comparative evaluation envisaged in the words "with others who were selected for promotion" calls for a comparison with those Foreign Service Officers who competed with Harter before the 1983 selection board. No other group would be relevant to the question of how grievant would have fared before that board had his most recent EER been without prejudicial errors. The files of the 1972 promotion group as a whole and the 1954 entry group as a whole were not before the 1983 board. We believe grievant is mistaken in interpreting the Court's comments as a call for a review of the promotion history of individuals who were not before the 1983 selection board. It is true the Court found that Harter was handicapped in 1983 by a defective EER, but in

similar situations in the past it has been found possible to judge whether an agency met or failed to meet its burden.

Grievant bases his request for information about the 1972 promotion group (and the 1954 entry group) in part on his assertion that the 1983 selection board could have looked at flawed material from an earlier date. But the file that was before the selection board contained no proven errors. What the selection board saw was what it properly should have seen except for the defective sentences in the 1983 report that are now in question. In urging the need to reach back through the years for a comparison, grievant argues that there is a history of 15 years of his inability to get a fair chance. But if wrongs were committed in the past, they are not before us now. We are limited to the question of whether the 1983 selection board would have promoted him absent the errors in his 1983 EER.

The circumstances in Reiner and Ehrman are not parallel to those in this case. In the two earlier cases the grieved errors had persisted for years (in Ehrman, for at least 13 years); for them it was reasonable, in seeking to establish how many promotions they might have won along the way, absent the errors, to simply put them on an equal footing with those of similar qualifications who had entered the Service at the same time they did. The grieved error at issue in the case before us was seen by only the 1983 selection board.

Grievant relies on a sentence in Henderson: "First, determining whether plaintiff should have been promoted, an exercise which requires comparing plaintiff's performance with that of his peers, has become more difficult." The quotation, drawn from a paragraph in which the Court dismissed one of the plaintiff's claims, does not support Harter's attempt to discover the

promotion history of the 1972 promotion group. The "peers" whose "performance" would have to be compared are more reasonably interpreted as the officers who competed with the plaintiff before the selection board in question.

Foreign Service Grievance Board regulations at 903.6 read:

> Each Party shall be entitled to serve interrogatories upon another Party, and have such interrogatories answered by the other Party unless the Board finds such interrogatories irrelevant, immaterial or unduly repetitive.

For the reasons set out above, we believe grievant's interrogatories concerning individuals who were not a part of the 1983 competition are neither relevant nor material to the only question before us -- whether the Department can prove that Harter would not have been promoted in 1983 if his last EER had been in order. Accordingly, grievant's request that this Board order the Department to respond to his interrogatories is denied.

FOR THE FOREIGN SERVICE

GRIEVANCE BOARD

/s/

Jerome H. Ross

/s/

_____

Geraldine Sheehan

/s/

_____

Stanley J. Siegel

Note: all signed by E. J. Findlay

May 6, 1986

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

John J. Harter

and

The Department of State

Record of Proceedings

No. ROP 83-106-State-68

Date: July 7, 1986

ORDER ON INTERROGATORIES

For the Foreign Service Grievance Board:

Presiding Member: Jerome Ross

Board Members: Stanley J. Siegel

Geraldine Sheehan

Special Assistant to the Board: James Riley

Representative for the Grievant:

Francis J. Chetwynd
Attorney

Representative for the Department:

Frank Alberti
Acting Director, Grievance Staff

ORDER

On March 21, 1986 grievant served interrogatories on the Department seeking to learn the professional qualifications and subsequent promotion history of the group that was promoted with him to FSO-3 in 1972 and of the group that entered the Foreign Service with him in 1954. The Department declined to respond on grounds that the interrogatories served no purpose and were not relevant to the issue at hand. Grievant then asked this Board to order the Department to respond. We held that grievant's interrogatories concerning individuals who were not part of the 1983 competition groups were neither relevant nor material to the question pending before us -- whether the Department can prove that Harter would not have been promoted in 1983 if his last

Employee Evaluation Report (EER) had been in order.

On May 14, 1986 grievant served another set of interrogatories on the Department concerning the group recommended for promotion by the 1983 Senior Threshold Board in the interfunctional and economic cones and requesting certain information about reconstituted panels. The Department answered some of the interrogatories but declined to answer others on the grounds that the information sought was irrelevant and immaterial to the case.

The Board's regulations read as follows:

Section 903.6. Each party shall be entitled to serve interrogatorrogatories upon another Party, and have such interrogatories answered by the other Party unless the Board finds such interrogatories irrelevant, immaterial or unduly repetitive.

Below is interrogatory No. 1 and the Department's objections:

1. Show the following information for each Foreign Service Officer who was recommended for promotion by the 1983 Senior Threshold Board, distinguishing betwen those who were recommended in the "interfunctional" competition and those who were promoted through competition within the "economic cone":

A. Date of entry into the Foreign Service and rank at the time of entry;

B. Basis of entry (i.e., through competitive examination or other);

C. Educational background, including years of undergraduate study, subjects of study, and highest academic degree(s) attained;

D. Professional experience prior to entry into the Foreign Service (positions held and years they were held);

E. Promotion history since entry into the Foreign Service (including the year of each promotion);

F. Geographic and functional areas of specialization within the Foreign Service;

G. Out-of-agency assignments;

H. Training assignments pursued during Foreign Service career;

I. Language qualifications, including a list of all languages studied at the expense of the Department of State;

J. Assignments involving supervisory and/or managerial responsibilities; and,

K. Brief description and location of each position held before and after promotion to the FS-1 (or former FSO-3) level.

The Department objects to each part of your interrogatory No. 1 because the information it seeks to elicit is irrelevant and immaterial to the case. A fair comparison of performance of Mr. Harter and his peers is mandated, not an analysis of educational, assignment and promotion histories. The requested information does not deal with on-the-job performance, and thus seeks information immaterial to Mr. Harter's 1983 Foreign Service Selection Board review.

With respect to interrogatory No. 1, we note that Selection Board precepts permit the boards to view an abbreviated Personal Audit Report (PAR) which is included in each file evaluated by the boards. This abbreviated PAR contains only the following information: date of entry into the Foreign Service and rank at the time of entry; promotion history since entry into the Foreign Service, including the year of each promotion; geographic and functional areas of specialization within the Foreign Service; out-of-agency assignments; training assignments pursued during Foreign Service career; and language qualifications, including those languages studied at the expense of the Department. The Selection Boards for 1983 had that information before them; therefore, we find the information to be relevant and material. Accordingly, the Department is directed to answer interrogatory No. 1 A, E, F, G, H. I, and K.

With respect to interrogatory No. 1J, we direct the Department to reply, noting that the information is available to Selection Boards through Section I.A. of the EER.

The request for information sought in interrogatory 1B, C and D is denied. The information in B and C is deleted from the PAR given to the boards; the information in D is not detailed in any document before the boards.

We emphasize that the above information is relevant and material only to the comparative evaluation of Harter and those recommended for promotion by the 1983 Selection Board, the only issue before us.

Below are the disputed questions in interrogatory No. 2:

For each year, since 1970, state the number of times the Department has used "reconstituted" panels to determine whether a Foreign Service Officer might have been promoted had errors or irregularities in selection procedures not occurred.

Describe each instance in which proeedings before a reconstituted panel have led to the promotion of the officer concerned, giving the memberships of the reconstituted panel, the year in which the promotion took place and the levels from which and to which each such officer was promoted.

Although the Department objected to both queries as not relevant or material to the case, we find that the grievant has a legitimate interest in the results of previous reconstituted boards. We therefore direct the Department to respond to the above questions.

FOR THE FOREIGN SERVICE GRIEVANCE BOARD

/s/

Jerome H. Ross

/s/

Geraldine Sheehan

/s/

Stanley J. Siegel

7-7-86

(date)

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

Record of Proceedings
No. ROP 83-106-

STATE-68
John Harter

and

Date: July 7, 1986

The Department of State

ORDER ON INTERIM RELIEF

For the Foreign Service Grievance Board:

Presiding Member: Jerome Ross

Board Members: Stanley J. Siegel

Geraldine Sheehan

Special Assistant to the Board: James Riley

Representative for the Grievant:

Francis J. Chetwynd
Attorney

Representative for the Department:

Frank Alberti
Acting Director, Grievance Staff

ORDER

This case was remanded to the Foreign Service Grievance Board (the Board) by the U. S. District Court for the District of Columbia to determine whether grievant would have been promoted in the absence of comments the Department had acknowledged should be deleted from his 1983 EER and to determine what relief, if any, is appropriate.

As a preliminary matter, grievant has renewed his request for interim relief and has asked the Board to determine that it was wrongfully denied him when he sought in September 1983 to be retained on the State Department's rolls pending the outcome of his grievance.

Grievant argues that the Department's original reason for its not granting interim relief, a finding that the grievance was frivolous, was not valid. He argues that the District Court has now found that one aspect of the grievance, the effect of certain statements in the contested EER, had merit and was the reason the case was remanded to the Board. Thus, argues grievant, he should now be reinstated retroactively to September 30, 1983, the date of his separation, with full back pay and benefits.

In response, the Department asserts that nothing in the Foreign Service Act of 1980 (the Act) authorizes the Board to reinstate the grievant pending the outcome of his case. The Department points to the language of Section 1106(8) of the Act, particularly that part which states that the Department "shall suspend" a separation action upon request of the Board. It interprets that to

mean that interim relief must be granted, if at all, before the Department separates an employee.

Grievant replies that such a literal interpretation is unwarranted and contrary to the discretionary authority given the Board in that section.

Interim relief may be granted by the agency and by this Board. With respect to the agency's authority, Section 664.16 of Volume 3 of the Foreign Affairs Manual in effect September 1983 (3 FAM) reads in pertinent part:

b. During the pendency of agency procedures under this section, the grievant may request a suspension of the proposed action of the character of separation or termination of the grievant, disciplinary action against the grievant, or recovery from the grievant of alleged overpayment of salary, expenses, or allowances, which is related to the grievance. The request must be in writing and addressed to the responsible official of the agency, as designated in Section 664.4-2, stating the reasons for such suspension. If the

request is related to separation or termination of the grievant, and the agency considers that the grievance is not frivolous and is integral to the proposed action, the agency shall suspend its proposed action until completion of agency procedures and for a period thereafter if necessary, consistent with Section 666.1, to permit the grievant to file a grievance with the Board, and to request interim relief under Section 666.3. If a request is denied, the agency shall provide the grievant in writing the reason for denial. Nothing in these regulations shall be deemed to preclude an employee from requesting the suspension of any proposed action.

This language makes clear that an agency must grant interim relief unless the agency considers the grievance frivolous or not integral to the separation. In denying interim relief the Department wrote on September 28, 1983, "The grievance is basically frivolous. It tries to reargue issues settled in 1980. . . Thus, the grievance also is not integral to your termination, and prescriptive relief is not warranted here. . ."

Whether the Department was right or wrong in that judgment is a question that had no practical effect on the grievant's fortunes, for if interim relief were due, it was due only "until completion of agency procedures, and for a period thereafter if necessary consistent with Section 666.1, to permit the grievant to file a grievance with the Board, and to request interim relief under Section 666.3." Agency procedures were completed September 28, 1983 -- two days before the grievant was separated -- at which point he was informed of the Department's denial both of his request for interim relief and of his grievance. He was not scheduled to be separated until September 30. Between September 28 and September 30 the grievant appealed to this Board on the interim relief question, was turned down, asked for reconsideration of the matter, and was turned down again. Thus, at the agency level he received all that had been contemplated by the regulations. Moreover, he received as much as if interim relief

had been granted by the agency in that he stayed on the rolls until agency procedures on the merits of his grievance were completed and until he could appeal the matter of interim relief to the Board.

Unlike the regulations that require an agency to grant interim relief, the statute and regulations governing this Board on questions of interim relief are open-ended; they leave the decision to the Board's discretion.

Section 1106(8) of the Act reads in pertinent part:

> If the Board determines that the Department is considering the involuntary separation of the grievant, disciplinary action against the grievant, or recovery from the grievant of alleged overpayment of salary, expenses, or allowances, which is related to a grievance pending before the Board and that such action should be suspended, the Department shall suspend such action until the Board has ruled upon the grievance. . .

The Board's regulations at 22 CFR 910 are identical.

The Board's interim relief authority serves to preserve the status quo until the grievance is resolved by the Board. But when, as here, the employee has been off the rolls for two and one-half years, that aim can no longer be met. The status quo has not existed since September 1983. Even had the Board decided favorably on interim relief when the question was first posed, that relief would have ended with the Board's final decision in March 1985 because Section 1106(8) authorizes the suspension of an action only until the Board has ruled upon the grievance. Now, a year after that decision and two and one-half years after the grievant's actual separation, we find it pointless to attempt to preserve a status quo that has not

existed for nearly three years.[1] We therefore conclude that the purpose of the interim relief provision of the statute would not be served by reinstatement at this time, particularly when we are nearing a final decision.[2]

---

[1] The Department urges that the wording of Section 1106(8) of the Act gives the Board authority only to suspend a proposed separation. It argues that there is no authority to require an agency to rehire a grievant pending the outcome of his case. In view of our disposition of the grievant's request, which is based on the circumstances of this particular case, we need not address the Department's broader argument.

[2] Among the remedies available to the Board in this case is reinstatement with back pay.

Accordingly, the request for reinstatement with back pay and benefits is denied.

FOR THE FOREIGN SERVICE GRIEVANCE BOARD

/ s /

_____

Jerome H. Ross

/ s /

_____

Geraldine Sheehan

/ s /

_____

Stanley J. Siegel

7-7-86

(date)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
CIRCUIT

No. 87-5419 September Term, 1988

John J. Harter, United States Court of Appeals

For the District of Columbia Circuit Appellant

v. FILED JUL 12 1989

United States of America, et al. CONSTANCE L. DUPRE

CLERK

ORDER

Upon consideration of Appellant's Petition for Rehearing, it is

ORDERED, by the Court, that the Petition is denied.

Per Curiam

Constance L. Dupre,

Clerk

By: /s/
Robert A.

Bonner

Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5419 September Term, 1988

John J. Harter, United States Court of Appeals

For the District of Columbia Circuit

Appellant

FILED JUL 12 1989

v.

CONSTANCE L. DUPRE

United States of America, et al. CLERK

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

Appellant's suggestion for rehearing en banc has been circulated to the full court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that the suggestion is denied.

FOR THE COURT:

Constance L. Dupre

Clerk

By:

/s/ Robert A. Bonner

Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-2321

John J. Harter — September Term, 1984

v.

United States Court of Appeals

For the District of Columbia Circuit

George P. Schultz, Secretary of State, United States Department of State; U. S. DEPARTMENT OF STATE; and ANDREW L. STEIGMAN, Former Deputy Assistant Secretary of State for Personnel, U. S. Department of State

FILED FEB 11 1985

GEORGE A. FISHER

CLERK

BEFORE: Wald, Edwards and Bork, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing, filed January 18, 1985, it is

ORDERED, by the Court, that the petition is denied.

FOR THE COURT

GEORGE A. FISHER, CLERK

BY: /s/ Robert A. Bonner

Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-2321

John J. Harter September Term, 1984

v. United States Court of Appeals

For the District of Columbia Circuit

George P. Schultz, Secretary of State, United States Department of State; U. S. DEPARTMENT OF STATE and ANDREW L. STEIGMAN, Former Deputy Assistant Secretary of State for Personnel, U. S. Department of State

FILED FEB 11, 1985

GEORGE A. FISHER

Clerk

BEFORE: Robinson, Chief Judge, Wright, Tamm, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

ORDER

Petitioner's Suggestion for Rehearing en banc, filed January 18, 1985, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED, by the Court, en banc, that the aforesaid suggestion is denied.

FOR THE COURT

GEORGE A. FISHER, CLERK

BY: /s/ Robert A. Bonner

Chief Deputy Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

April 29, 1985

Mr. John H. Harter
2066 Royal Fern Court
Reston, VA 22091

Re: John J. Harter
v. George P. Shultz, United States Secretary
of State, et al.
No. 84-6440

Dear Mr. Harter:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

Alexander L. Stevas,
Clerk

/s/

THE FOREIGN SERVICE ACT OF 1980

TITLE I -- THE FOREIGN SERVICE OF THE UNITED STATES

CHAPTER 1 -- GENERAL PROVISIONS

SEC. 3901. FINDINGS AND OBJECTIVES.--(a) The Congress finds that --

(1) a career foreign service, characterized by excellence and professionalism, is essential in the national interest to assist the President and the Secretary of State in conducting the foreign affairs of the United States;

(2) the scope and complexity of the foreign affairs of the Nation have heightened the need for a professional foreign service that will serve the foreign affairs interests of the United States in an integrated fashion and that can provide a resource of qualified personnel for the

President, the Secretary of State, and the agencies concerned with foreign affairs;

(3) the Foreign Service of the United States, established under the Act of May 24, 1924 (commonly known as the Rogers Act) and continued by the Foreign Service Act of 1946, must be preserved, strengthened, and improved in order to carry out its mission effectively in response to the complex challenges of modern diplomacy and international relations;

(4) the members of the Foreign Service should be representative of the American people, aware of the principles and history of the United States and informed of current concerns and trends in American life, knowledgeable of the affairs, cultures, and languages of other countries, and available to serve in assignments throughout the world; and

(5) the Foreign Service should be operated on the basis of merit principles.

(b) The objective of this Act is to strengthen and improve the Foreign Service of the United States by --

(1) Assuring, in accordance with merit principles, admission through impartial and rigorous examination, acquisition of career status only by those who have demonstrated their fitness through successful completion of probationary assignments, effective career development, advancement and retention of the ablest, and separation of those who do not meet the requisite standards of performance;

(2) fostering the development and vigorous implementation of policies and procedures, including affirmative action programs, which will facilitate and encourage (A) entry into and advancement in the Foreign Service by persons from all segments of American society, and (B) equal opportunity and fair and equitable treatment for all without regard to political affiliation, race,

color, religion, national origin, sex, marital status, age, or handicapping condition;

(3) providing for more efficient, economical, and equitable personnel admlinistration through a simplified structure of Foreign Service personnel categories and salaries;

(4) establishing a statutory basis for participation by the members of the Foreign Service, through their elected representatives, in the formulation of personnel policies and procedures which affect their conditions of employment, and maintaining a fair and effective system for the resolution of individual grievances that will ensure the fullest measure of due process for the members of the Foreign Service. . .

(7) establishing a Senior Foreign Service which is characterized by strong policy formulation capabilities, outstanding executive leadership qualities, and highly developed functional, foreign language, and area expertise;

(8) improving Foreign Service managerial flexibility and effectiveness. . .and

(10) otherwise enabling the Foreign Service to serve effectively the interests of the United States and to provide the highest caliber of representation in the conduct of foreign affairs. . .

SEC. 3905. MERIT PRINCIPLES; PROTECTIONS FOR MEMBERS OF THE SERVICE; AND MINORITY RECRUITMENT.

(a)(1) All personnel actions with respect to career members and career candidates in the Service (including applicants for career candidate appointments) shall be made in accordance with merit principles.

(2) For purposes of paragraph (1), the term "personnel action" means--

(A) any appointment , promotion, assignment (including assignment to any position or salary class), award of performance pay or special differential, within-class salary increase, separation, or performance evaluation, and

(B) Any decision, recommendation, examination, or ranking provided for
under this Act which relates to any action referred to in subparaph (A). . .

SEC. 3943. APPOINTMENTS BY THE SECRETARY. -- The Secretary may appoint the members of the Service. . . in accordance with this Act and such regulations as the Secretary may prescribe. . .

SEC. 4001. PROMOTIONS. . .

(b) Except as provided in section 4006(a), promotions of --

. . .(2) members of the Service assigned to a salary class in the Foreign Service Schedule (including promotions of such members into the Senior Foreign Service) shall be based upon the recommendations and rankings of selection boards established under section 4002, except that the Secretary may by regulation specify categories of career members, and categories of career candidates, assigned to salary classes in the Foreign

Service Schedule who may receive promotions on the basis of satisfactory performance.

(c)(1) Promotions into the Senior Foreign Service shall be recommended by selection boards only from among career members of the Service assigned to class 1 in the Foreign Service Schedule who request that they be considered for promotion into the Senior Foreign Service. The Secretary shall prescribe the length of the period after such a request is made (within any applicable time in class limitation established under section 4007(a) during which such members may be considered by selection boards for entry into the Senior Foreign Service. A request by a member for consideration for promotion into the Senior Foreign Service under this subsection may be withdrawn by the member, but if it is withdrawn, that member may not thereafter request consideration for promotion into the Senior Foreign Service. . .

SEC. 4002. SELECTION BOARDS. -- (a) The Secretary shall establish selection boards to evaluate the performance of members of the Senior Foreign Service and members of the Service assigned to a salary class in the Foreign Service Schedule. Selection boards shall, in accordance with precepts prescribed by the Secretary, rank the members of a salary class on the basis of relative performance and may make recommendations for --

(1) promotions in accordance with section 4001. . .

SEC. 4003. BASIS FOR SELECTION BOARD REVIEW. -- (a) Recommendations and rankings by selection boards shall be based upon records of the character, ability, conduct, quality of work, industry, experience, dependability, usefulness, and general performance of members of the Service. Such

records may include reports prepared by or on behalf of the Inspector General of the Department of State and the Foreign Service, performance evaluation reports of supervisors, records of commendations, reports of language test scores from the Foreign Service Institute, awards, reprimands, and other disciplinary actions, and (with respect to members of the Senior Foreign Service) records of current and prospective assignments.

(b) Precepts for selection boards shall include a description of the needs of the Service for performance requirements, skills, and qualities, which are to be considered in recommendations for promotion. The precepts for selection boards responsible for recommending promotions into and within the Senior Foreign Service shall emphasize performance which demonstrates the strong policy formulation capabilities, executive leadership qualities, and highly developed functional and area

expertise, which are required for the Senior Foreign Service. . .

SEC. 4005. IMPLEMENTATION OF SELECTION BOARD RECOMMENDATIONS.

-- (a) Recommendations for promotion made by selection boards shall be submitted to the Secretary in rank order by salary class or in rank order by specialization within a salary class. The Secretary shall make promotions and, with respect to career appointments into or within the Senior Foreign Service, shall make recommendations to the President for promotions, in accordance with the rankings of the selection boards. . .

SEC. 4006. OTHER BASES FOR INCREASING PAY. -- (A) The Secretary may pursuant to a recommendation of the Foreign Service Grievance Board. . .

(2) promote a member of the Service under section 3943. . .

SEC. 4007. RETIREMENT FOR EXPIRATION OF TIME IN CLASS. -- (a)(1) The Secretary shall, by regulation, establish maximum time in class limitations for. . .

(B) Foreign Service officers. . .

(2) Maximum time in class limitations under this subsection. . .may apply with respect to the time a member may remain in a single salary class or in a combination of salary classes.

(3) The Secretary may, by regulation, increase or decrease any maximum time in class established under this subsection as the needs of the Service may require. . .

(c) Any member of the Service --

(1) whose maximum time in class under subsection (a) expires and who is not promoted to a

higher class or combination of classes, as the case may be. . .
shall be retired from the Service and receive benefits in accordance with section 4009. . .

SEC. 4009. RETIREMENT BENEFITS -- (a) A member of the Service --

(2) who is retired under section 4007(c)(1). . .

shall receive retirement benefits in accordance with section 4046 ["COMPUTATION OF ANNUITIES"]. . .

SEC. 4131. DEFINITION OF GRIEVANCE. -- (a)(1) Except as provided in subsection (b), for purposes of this chapter, the term "grievance" means any act, omission, or condition subject to the control of the Secretary which is alleged to deprive a member of the Service who is a citizen of the United States of a right or benefit authorized by law or regulation or which is otherwise a source of concern or dissatisfaction to the member, including --

(A) separation of the member allegedly contrary to laws or regulations, or predicated upon alleged inaccuracy, omission, error, or falsely prejudicial character of information in any part of the official personnel record of the member;

(B) other alleged violation, misinterpretation, or misapplication of applicable laws, regulations, or published policy affecting the terms and conditions

of the employment or career status of the member. . .

(E) alleged inaccuracy, omission, error, or falsely prejudicial character of information in the official personnel record of the member which is or could be prejudicial to the member. . .

SEC. 4135. FOREIGN SERVICE GRIEVANCE BOARD. -- (a) There is established the Foreign Service Grievance Board (hereinafter in this chapter referred to as the "Board"). The Board shall consist of no fewer than 5 members who shall be independent, distinguished citizens of the United States, well known for their integrity, who are not employees of the Department or members of the Service. . .

SEC. 4136. BOARD PROCEDURES. -- The Board may adopt regulations concerning its organization and procedures. Such regulations shall include provision for the following:

(1) The Board shall conduct a hearing at the request of a grievant in any case which involves --

(A) . . . the retirement of a grievant from the Service under section 4007. . .

(2) . . . Testimony at a hearing shall be given under oath. . .

(3) Each party. . . shall be entitled to examine and cross-examine witnesses at the hearing or by deposition and to serve interrogatories upon another party and have such interrogatories answered by the other party unless the Board finds such interrogatory irrelevant, immaterial, or unduly repetitive. Upon request of the Board, or upon a request of the grievant deemed relevant and material by the Board, an agency shall promptly make available at the hearing or by deposition any witness under its control, supervision, or responsibility, except that if the Board determines that the presence of such witness at the hearing is required for just resolution of the grievance, then the witness shall be made available at the hearing, with necessary costs and travel expenses paid by the Department. . ..

(4) During any hearing held by the Board, any oral or documentary evidence may be received, but the Board shall exclude any irrelevant, immaterial, or unduly repetitious evidence, as determined under section 556 of title 5, United States Code.

(5) A verbatim transcript shall be made of any hearing and shall be part of the record of proceedings. . .

(8) If the Board determines that the Department is considering the involuntary separation of the grievant . . ., which is related to a grievance pending before the Board and that such action should be suspended, the Department shall suspend such action until the Board has ruled upon the grievance. . .

;SEC. 4137. BOARD DECISIONS. -- (a) Upon completion of its proceedings, the Board shall

expeditiously decide the grievance on the basis of the record of proceedings. In each case the decision of the Board shall be in writing, and shall include findings of fact and a statement of the reasons for the decision of the Board.

(b) If the Board finds that the grievance is meritorious, the Board shall have the authority to direct the Department --

(1) to correct any official personnel record relating to the grievant which the Board finds to be inaccurate or erroneous, to have an omission, or to contain information of a falsely prejudicial character;

(2) to reverse a decision denying the grievant compensation or any other perquisite of employment authorized by laws or regulations when the Board finds that such decision was arbitrary, capricious, or contrary to laws or regulations;

(3) to retain in the Service a member whose separation would be in consequence of the matter by which the member is aggrieved;

(4) to reinstate the grievant, and to grant the grievant back pay in accordance with section 5596(b)(1) of title 5, United States code;

(5) to pay reasonable attorney fees to the grievant to the same extent and in the same manner as such fees may be required by the Merit Systems Protection Board under section 7701(g) of title 5, United States Code; and

(6) to take such other remedial action as may be appropriate under procedures agreed to by the Department and the exclusive representative (if any).

(c) Except as provided in subsection (d), decisions of the Board under this chapter shall be final, subject only to judicial review as provided in section 4140.

(d) If the Board finds that the grievance is meritorious and that remedial action should be

taken that relates directly to promotion or assignment of the grievant or to other remedial action not otherwise provided for in this section, or if the Board finds that the evidence before it warrants disciplinary action against any employee of the Department or member of the Service, it shall make an appropriate recommendation to the Secretary. The Secretary shall make a written decision on the recommendation of the Board within 30 days after receiving the recommendation. The Secretary shall implement the recommendation of the Board except to the extent that, in a decision made within that 30-day period, the Secretary rejects the recommendation in whole or in part on the basis of a determination that implementation of the recommendation would be contrary to law or would adversely affect the foreign policy or national security of the United States. If the Secretary rejects the recommendation in whole or in part, the decision shall specify the reasons for such action. Pending the decision of the

Secretary, there shall be no ex parte communication concerning the grievance between the Secretary and any person involved in theproceedings of the Board. The Secretary shall, however, have access to the entire record of the proceedings of the Board. .

SEC. 4140. JUDICIAL REVIEW. -- Any aggrieved party may obtain judicial review of a final action of the Secretary or the Board on any grievance in the district courts of the United States in accordance with the standards set forth in chapter 7 of title 5, United States Code. Section 706 of title 5, United States Code, shall apply without limitation or exception. . .

REGULATIONS, FOREIGN SERVICE GRIEVANCE BOARD

22 C.F.R. 901-911

PART 901 -- GENERAL

Subpart A -- Purpose and Scope

Sec. 901.1 Purpose and scope.

The regulations contained in this chapter establish the internal organization of the Foreign Service Grievance Board and prescribe its procedures in:

(a) Determining its jurisdiction in cases involving grievances and separation for cause proceedings;

(b) Compiling a record in such cases;

(c) Conducting hearings in such cases, when required or deemed necessary; and

(d) Deciding such cases, or otherwise disposing of them, so as to ensure the fullest measure of due process for the members of the Foreign Service. . .

Sec. 901.18 Grievance.

(a) "Grievance" means any act, omission, or condition subject to the control of an Agency which is alleged to deprive a Member of the Service who is a citizen of the United States of a right or benefit authorized by law or regulation or is otherwise a source of concern or dissatisfaction to the Member, including but not limited to:

(1) Complaints against separation of a Member allegedly contrary to law or regulation or predicated upon alleged inaccuracy, omission, error or falsely prejudicial character of information in any part of the official personnel record of the Member;

(2) Other alleged violation, misinterpretation or misapplication of applicable law, regulation, collective bargaining agreement or published post or agency policy affecting the terms and conditions of the employment or career status of the Member. . .

(5) Alleged inaccuracy, omission, error, or falsely prejudicial character of information in the official personnel record of the Member which is or could be prejudicial to the Member. . .

PART 903 -- INITIATION AND DOCUMENTATION OF CASES

Sec. 903.1 Initiation of cases. . .

Sec. 903.6 Interrogatories.

Each Party shall be entitled to serve interrogatories upon another Party, and have such interrogatories answered by the other Party unless

the Board finds such interrogatories irrelevant, immaterial, or unduly repetitive. Parties shall follow procedures established by the Board concerning the use of interrogatories. . .

PART 905 -- BURDEN OF PROOF

Sec. 905.1 Grievances other than disciplinary actions.

(a) In all grievances other than those concerning disciplinary actions, the grievant has the burden of establishing, by a preponderance of the evidence, that the grievance is meritorious.

(b) Where a grievant establishes that an evaluation contained falsely prejudicial material which may have ben a substantial factor in an agency action, and the question is presented whether the agency would have taken the same action had the evaluation not contained that material, the burden will shift to the agency to establish, by a preponderance of the evidence, that it would have done so.

(c) Where a grievant establishes that a procedural error occurred which is of such a nature

that it may have been a substantial factor in an agency action with respect to the grievant, and the question is presented whether the agency would have taken the same action had the procedural error not occurred, the burden will shift to the agency to establish, by a preponderance of the evidence, that it would have done so. . .

PART 906 -- HEARINGS

SEC. 906.1 Decision whether to hold a hearing.

After deciding either to accept jurisdiction over a grievance or to postpone decision of that question. . .the Board will make an initial determination of whether a hearing shall be held in accordance with Part 905 of this chapter, or whether the grievance shall be resolved without a hearing. . .

SEC. 906.2 Mandatory hearing.

The Board shall conduct a hearing --

(a) At the request of the Grievant in any case which involves. . . a Grievant's retirement from the Service for expiration of time-in-class. . .

SEC. 906.7 Conduct of hearing

(a) *Authorized attendance.* . .

(b) *Procedure.* Hearings shall be conducted by the presiding member so as to assure a full and fair proceeding. The Board shall not be limited by the legal rules of evidence. However, the presiding member shall exclude irrelevant, immaterial, or undul repetitive evidence. The Board may require the Parties to designate one of their representatives as principal spokesperson. . .

(d) *Evidence.* Subject to the presiding member's rulings on the relevancy, materiality, and repetitious nature of evidence, the Parties may offer such evidence, including interrogatories, depositions and Agency records as they desire. They shall produce such additional evidence as the presiding member shall consider relevant and material. Where deemed appropriate by the Board, the Parties may be supplied only with a summary or extract of classified material. . .

(e) *Testimony.* Testimony at a hearing shall be given under oath or affirmation.

(f) *Transcript.* A verbatim transcript shall be made of any hearing and shall be part of the Record of Proceedings.

SEC. 906.8 Witnesses.

(a) *General.* Each Party shall be entitled to examine and cross-examine witnesses at the hearing or by deposition. A Party wishing to take the deposition of a witness shall give the other Parties reasonable notice of the time and place of the deposition and of the identity of the witness.

(b) *Availability.* Upon request of the Board or upon request of the Grievant. . .deemed relevant and material by the Board, an Agency shall promptly make available at the hearing or by deposition any witness under its control, supervision, or responsibility. If the Board determines that the actual presence of such witness

at the hearing is required for just resolution of the case, the witness shall be made available at the hearing, with necessary costs and travel expenses paid by the Agency which is a Party to the hearing.

. .

PART 908 -- REMEDIES

SEC. 908.1 Board orders.

If the Board finds that a grievance is meritorious, the Board shall have the authority to direct the Agency:

(a) To correct any official personnel record relating to the Grievant which the Board finds to be inaccurate or erroneous, to have an omission, or to contain information of a falsely prejudicial character;

(b) To reverse a decision denying the Grievant compensation or any other perquisite of employment authorized by laws or regulations when the Board finds that such decision was arbitrary, capricious, or contrary to laws or regulations;

(c) To retain in the Service a Member whose separation would be in consequence of the matter by which the Member is aggrieved;

(d) To reinstate the Grievant, and to grant the Grievant back pay, where it is established that the separation or suspension without pay of the employee was unjustified or unwarranted under the Back Pay Act [5 U.S.C. 5596(b)(1)];

(e) To pay reasonable attorney fees to the same extent and in the same manner as such fees may be required by the Merit Systems Protection Board under 5 U. S. C. Section 7701(g); or

(f) To take any corrective action deemed appropriate by the Board provided it is not contrary to law or collective bargaining agrement.

SEC. 908.2 Board recommendations.

(a) If the Board finds that the grievance is meritorious and that remedial action should be taken that relates directly to promotion or

assignment of the Grievant or to other remedial action not otherwise provided for in this section, or if the Board finds that the evidence in a grievance proceeding warrants disciplinary action against any employee of an Agency, it shall make an appropriate recommendation to the head of the concerned Agency.

(b) The head of the Agency shall make a written decision on the recommendation of the Board within 30 days after receiving the recommendation and shall implement the recommendation of the Board except to the extent that the head of the Agency rejects the recommendation in whole or in part on the basis of a determination that implementation of the recommendation would be contrary to law or would adversely affect the foreign policy or national security
of the United States. If the head of the Agency rejects the recommendation in whole or in part, the decision shall specify the reasons for such action.

Copies of the decision shall be served on the other Parties. Pending the decision of the head of the Agency, there shall be no ex parte communication concerning the grievance between the head of the Agency and any person involved in the proceedings of the Board. The head of the Agency shall, however, have access to the entire Record of the Proceedings of the Board.

PART 909 -- DECISION MAKING

SEC. 909.1 BASIS

Decisions of the Board shall be based upon the Record of Proceedings, shall be in writing, shall include findings of fact, and shall include a statement of the reasons for the decision.

SEC. 909.2 Board order.

Where the Board's decision imposes action on an Agency the decision shall be in the form of a remedial order addressed to the designated official of the Agency. A copy of the decision shall be supplied to each Party.

SEC. 909.3 Board recommendation.

Where the Board's decision is a recommendation, it shall be directed to the head of the Agency. A copy of the decision shall be supplied to each Party. . .

PART 910 -- MISCELLANEOUS

SEC. 910.1 Suspension of Agency actions.

(a) If the Board determines that the Agency is considering the involuntary separation of the Grievant. . . and that such action should be

suspended, the agency shall suspend such action until the Board has ruled on the grievance. . .

(b) The Board shall expedite its decisions on requested suspensions of proposed Agency actions. . .

SEC. 910.6 Judicial review.

Any aggrieved Party may obtain judicial review of a final action of an Agency head or the Board on any grievance in the district courts of the United States in accordance with the standards set forth in Chapter 7 of title 5 of the United States Code. 5 U. S. C. 706 shall apply without limitation or exception. . .

GRIEVANCE REGULATIONS, DEPARTMENT OF STATE
(FOREIGN AFFAIRS MANUAL, VOLUME 3, 660-668[1])

660 FOREIGN SERVICE GRIEVANCE SYSTEM

661 AUTHORITY. . .

662 DEFINITIONS. . .

c. Grievance means any act or condition subject to the control of the foreign affairs agencies (the Department of State. . .) which is alleged to deprive the grievant of a right or benefit authorized by law or regulation or is otherwise a source of concern or dissatisfaction to the grievant, including, but not limited to the following:

l. complaints against separation of an officer or employee allegedly contrary to law or regulation or predicated upon alleged inaccuracy (including

[1] The Regulations quoted herein were in effect in 1983 and 1984. They have since been changed.

inaccuracy resulting from omission of any relevant and material document), error, or falsely prejudicial character of any part of the grievant's official personnel record;

2. other alleged violation, misinterpretion, or misapplication of applicable law, regulation, or published policy affecting the terms and conditions of the grievant's employment or career status. . .

5. alleged inaccuracy, error, or falsely prejudicial material in the

grievant's official personnel file. . .

663 GENERAL PROVISIONS

663.1 Statement of Purpose

These regulations establish procedures as required by law to provide Foreign Service officers and employees (and their survivors) of the foreign affairs agencies, a grievance procedure to insure a full measure of due process, and to provide for the

just consideration and resolution of grievances of such officers, employees, and survivors. No regulation promulgated in this section shall be interpreted or applied in any manner which would alter or abridge the provisions of the due process established by the Congress in Public Law 94.141d, 22 U. S. C. 1037, Section 404(a). . .

663.2 Discussion of Complaints

a. Every effort should be made to settle any employee complaint informally, promptly, and satisfactorily.

b. Supervisors and other responsible officers should encourage employees to discuss complaints with them and should respond in a timely manner to resolve the complaints. . .

663.5-2 Agency Records. . .

b. The agency shall, subject to applicable law, promptly furnish the grievant any agency record which the grievant requests to sustantiate the grievance and which the agency or the Grievance Board determines is relevant and material to the proceeding. When deemed appropriate by the agency or the Board, a grievant may be supplied with only a summary or extract of classified material. If a request by a grievant for a document is denied prior to or during the agency's consideration of a grievance, such denial may be raised by the grievant as an integral paart of the grievance before the Board. . .

664 AGENCY PROCEDURES

664.1 Initial Consideration

a. Grievances shall be considered through the steps provided in this section before they are filed with the Grievance Board.

b. During the pendency of agency procedures under this section, the grievant may request a suspension of the proposed action of the character of separation or termination of the grievant. . . The request must be in writing and addressed to the responsible official of the agencies, as designated in section 664.4-2 stating the reasons for such suspension. If the request is related to separation or termination of the grievant, and the agency considers that the grievance is not frivolous and is integral to the proposed action, the agency shall suspend its proposed action until completion of agency procedures, and for a period thereafter, if necessary consistent with section 666.1, to permit the grievant to file a grievance with the Board, and to request interim relief under section 666.3. If a request is denied, the agency shall provide the grievant in writing the reason for denial. Nothing in these regulations shall be deemed to preclude an employee from requesting the suspension

of any proposed action. . .

"AUTHORITY" FOR RECONSTITUTED SELECTION BOARD[2]

March 26, 1986

MEMORANDUM TO THE FILES

SUBJECT: Procedure for Reconstituted Boards in Grievance Cases

The following persons met on Tuesday, March 18, 1986 to discuss the above subject and to devise appropriate procedures for reconstituting the Senior Threshold Board to review class FO-1 officers:

---

2 The Reconstituted Selection Board that met on April 9, 1986 to consider Petitioner's promotability pursuant to the remand order of the district court was not authorized by statute or regulation. Its "authority" lay solely in the two memoranda quoted here in full.

PER/G - Michelle Truitt

PER/PE - Betty-Jane Jones

PER/G - Frank Alberti

PER/PE - Barbara Prather

PER/PE - Cheryl Hodge

It was agreed that the following would apply for STB review:

1. The grievant(s) will be compared with a group consisting of three officers from the bottom of the group promoted on a classwide basis and two officers from the bottom of the group promoted on a functional basis in the function of the grievant(s). If there is more than one grievant from the same cone, two officers from the bottom of the conal promotion list will be included in the competition group for each such grievant.

2. The Board will rank order the comparison group and the grievant(s) on a classwide basis first. Those reached for promotion classwide, i.e., the top three, will not be reviewed in functional competition. The Board will then rank those officers below the cut-off line functionally.

3. If any grievant places below the cut-off line on either list, i.e., lower than the number of places equal to the number of promotees taken from each

promotion list for comparison, he/she will not be promoted. If anywhere else on the list(s), the grievant will be promoted.

Refer to the Memorandum to the Files, same subject, dated 5/2/84 drafted by Steve Block for the procedures governing boards other than the STB.

Clearance: PER/PE: BJJones (initialed)

cc: PER/G - Ms. Truitt
PER/PE - Ms. Hodge

PER/PE: BBPrather 3/18/86

United States Department of State

Washington, D. C.

20520

March 24, 1986

MEMORANDUM

To: PER/PE - Betty Jane Jones

From: DGP/PER - Herman J. Cohen
(initialed)

Subject: John Harter

Reference: My Memorandum to you of
March16,198 March 16, 1986

Pursuant to a court determination and administrative decision, please reconstitute the 1983 Foreign Service Selection Boards to the extent required to review Mr. John J. Harter's Official Performance Folder, and for the Boards to determine if Mr. Harter would have been recommended and reached for promotion that year. Mr. Harter is to be reviewed first to determine if he would have been recommended and reached for

promotion interfunctionally in the class-wide competition. Then, Mr. Harter should be competed to determine if he would have been recommended and reached in the economic cone competition.

The Department is subject to stringent time requirements in this case. The reconstituted Board's findings, therefore, must be made available to me no later than Friday, April 18, 1986. Your attention to this matter is, therefore, greatly appreciated.

(signed: Barbara B. Prather)
4/11/86

_____

_____

Action completed

Date

(signed: Michele Truitt)
4/15/86

_____

_____

Verified
Date

Supreme Court, U.S.
FILED
DEC 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-575

In the Supreme Court of the United States

OCTOBER TERM, 1989

JOHN J. HARTER, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

JOHN G. ROBERTS, JR.
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STUART M. GERSON
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QUESTION PRESENTED

Whether, pursuant to the Foreign Service Act of 1980 and its implementing regulations, an agency may use – and the Foreign Service Grievance Board may credit – the results of a Reconstituted Selection Board's deliberations in grievance proceedings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 871 F.2d 1140. The opinion of the district court (Pet. App. 66-67) and the decision of the Foreign Service Grievance Board (Pet. App. 135-174) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1989. A petition for rehearing was denied on July 12, 1989 (Pet. App. 207-208). The petition for a writ of certiorari was filed on October 10, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Foreign Service consists of federal employees, primarily in the Department of State, who assist the Presi-

dent and the Secretary of State in conducting the foreign affairs of the United States. 22 U.S.C. 3901. Promotions in the Foreign Service are based upon recommendations and rankings of competing Foreign Service Officers by selection boards established pursuant to the Foreign Service Act of 1980 (Act). 22 U.S.C. 4002, 4003. The Act requires the selection boards to rank officers according to "precepts established by the Secretary [of State]" based on "relative performance." 22 U.S.C. 4002(a). The Secretary is required to promulgate regulations prescribing a time-frame within which officers must be promoted, if eligible; those officers who fail to be promoted within the prescribed time period face mandatory retirement from the Service. 22 U.S.C. 4007.

An officer who believes that his failure to be promoted was the result of "inaccuracy, omission, error, or falsely prejudicial character of information" (22 U.S.C. 4131(a)(1)(A)) in his personnel record may challenge the alleged error by filing a grievance with the Foreign Service Grievance Board (Board). 22 U.S.C. 4134, 4135, 4136. If dissatisfied with the Board's decision, the grievant may then seek judicial review in a federal district court, in accordance with the Administrative Procedure Act, 5 U.S.C. 706. 22 U.S.C. 4140. The grievant has the initial burden to show that the alleged error was a "substantial factor" in the selection board's decision not to recommend promotion. 22 C.F.R. 905.1(b); *Reiner* v. *United States*, 686 F.2d 1017, 1021 (D.C. Cir. 1982). If the grievant makes that initial showing, the burden then shifts to the State Department to show by a preponderance of the evidence that, even in the absence of the Department's administrative error, the officer would not have been promoted. 22 C.F.R. 905.1(b); *Reiner*, 686 F.2d at 1021.

2. a. Petitioner was involuntarily retired from the Foreign Service in 1983 after he failed to attain promotion

to the Senior Foreign Service at the expiration of his time in class.[1] He filed a grievance with the Board, alleging that certain unfavorable remarks in his Employee Evaluation Report (EER) may have contributed to his being passed over. The Board initially denied relief, but the district court remanded the grievance to the Board, ordering the State Department to establish, if it could, that petitioner would not have been promoted even absent the unfavorable remarks. Pet. App. 3-4, 68.

b. On remand to the Board, the State Department sought to discharge its burden. Toward that end, it convened a Reconstituted Selection Board (RSB), a panel that attempts to replicate as closely as possible the circumstances and procedures of the original selection board.[2] After the allegedly prejudicial remarks had been redacted from petitioner's file, the RSB compared that file to those of the lowest qualified candidates who had been promoted in the 1983 class. Notwithstanding the deletions, the RSB ultimately ranked petitioner below all of the other officers whose files were before it. The Department submitted those results to the Board as part of its case on remand. Pet. App. 7

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[1] At the time of his separation, petitioner's classification was FSO-1. Pet. App. 31.

[2] The RSB members are selected in accordance with the same guidelines, and operate in accordance with the same rules, as do regular selection board members. See 22 U.S.C. 4002, 4003. There are, however, some differences in the process by which recommendations and rankings are made. Whereas the original selection board first determines which officers will or will not be recommended for promotion consideration, and then ranks in order of merit those whom it has recommended for consideration, the RSB simply compares the grievant's file to the files of those officers who were at the bottom of the original selection board's rank order list, just above the promotion line. The RSB, which is not told which file is the grievant's, deems a grievant promoted if he ranks higher than anyone promoted by the original selection board. See Pet. App. 157-159.

The Board credited the RSB results and held that the agency had met its burden of proof. In so doing, the Board rejected petitioner's objections to the Department's use of an RSB. The Board approved the use of reconstituted boards "as a means for agencies to obtain evidence to be weighed along with other evidence in their effort to meet the burden of proof." Pet. App. 150. While noting that the RSB procedure is "imperfect," the Board explained that it is "a much fairer way to determine promotability than is a decision by management alone." *Ibid.* In particular, the Board noted, reconstituted boards are structured "in accordance with the rules for regular boards," in that they include members of the public, women and minorities, and officers of the appropriate grade and specialty. See 22 U.S.C. 4002(b); Pet. App. 151. Moreover, the Board observed, RSB members are sworn and instructed to follow the precepts that governed selection boards in the year in question. Pet. App. 151.

c. Petitioner again appealed to the district court, which affirmed the Board's denial of relief. Pet. App. 66. The district court explained that the Department was entitled to rely on the conclusions of an RSB in carrying its burden of proof, and that it was appropriate for the Board to consider the RSB results in reaching its decision. Pet. App. 70. The court held that the administrative record on remand "amply supports the conclusion that it is unlikely that [petitioner] would have been promoted had the deletions been made at the time of the challenged selection." Pet. App. 61.

d. The court of appeals affirmed. Pet. App. 1-17. The court first rejected the contention that the Foreign Service Act of 1980 precludes the Department's use of—and the Board's reliance upon—the results of RSB deliberations. The court explained that the Foreign Service Act explicitly sanctions the use of "any oral or documentary evidence" in grievance proceedings, subject only to a requirement that

the Board exclude "irrelevant, immaterial, or unduly repetitious evidence." 22 U.S.C. 4136(4). Pet. App. 9. Particularly in light of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court continued, petitioner failed to establish that the Board had unreasonably applied its broad procedural authority, or that it had erred in accepting the RSB's evidence. Pet. App. 9-10. Moreover, the court noted, "[i]n endorsing the use of an RSB" in this case, "the Board reasonably opted to rely on 'a mechanism that resembles as closely as possible the selection boards that are mandated in the Foreign Service Act.' " Pet. App. 11. The court accordingly concluded that "[i]t was plainly within the Board's discretion to fashion the grievance-resolution process after the statutory promotion procedure." Pet. App. 14. Finally, the court rejected petitioner's claim that the RSB had not reviewed a sufficient number of files in this case, noting that this contention "goes only to the weight, and not to the 'admissibility' of the resulting evidence." Pet. App. 16.

ARGUMENT

The decision of the court of appeals is correct, and, as petitioner acknowledges (Pet. 3), it does not conflict with the decision of any other court of appeals. Further review is therefore unwarranted.

Petitioner does not dispute the court of appeals' holding that the RSB mechanism resembles as closely as possible the selection boards that are mandated by the Foreign Service Act of 1980. Indeed, petitioner acknowledges that a reconstituted board is "composed of members of similar composition as selection boards" (Pet. 7). He contends, however, that there is no explicit statutory or regulatory authority for the RSB procedure. But as the court of appeals recognized (Pet. App. 9), the Foreign Service Act of

1980 expressly authorizes the Department to submit, and the Board to receive, "any oral or documentary evidence"—subject only to the restriction that such evidence not be "irrelevant, immaterial, or unduly repetitious" (22 U.S.C. 4136(4)). Pursuant to that broad mandate, the Board plainly has discretion to accept the determinations of an RSB.

Petitioner asserts (Pet. 8), however, that the Board erred in relying upon the RSB's finding because it constituted hearsay evidence. That contention is meritless. Nothing in the Foreign Service Act of 1980 prevents the Board from considering hearsay evidence (see 22 U.S.C. 4136(4)), and the Grievance Board regulations expressly state that the Board "shall not be limited by the legal rules of evidence" (22 C.F.R. 906.7(b)).[3]

[3] *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), on which petitioner relies (Pet. 9), has nothing to do with the issue in this case. In *Accardi*, the Court held that petitioner was entitled to prove his allegation that the Board of Immigration Appeals had failed to exercise its discretion because its decision was dictated by the Attorney General. There is no suggestion in this case that the denial of promotion was dictated by a superior government official, or that the appropriate decisionmakers were unable to exercise their statutory authority.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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Attorneys

DECEMBER 1989

* The Solicitor General is disqualified in this case.

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UNITED STATES OF AMERICA, *ET AL.*,

Respondents.

PETITIONER'S REPLY

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PETITIONER'S REPLY

While Respondents concede the major elements of Petitioner's argument — promotions by selection board and grievances before the Foreign Service Grievance Board are statutorily protected — they see no interference with this statutory scheme by the delegation to a "reconstituted selection board" for determination of the ultimate question before a grievance board, challenging the propriety of the selection process. In supporting the use of hearsay evidence for this ultimate question, Respondents overlook the implementing regulations for the conduct of grievance hearings, necessitating this brief reply.

1. Respondents fail to examine and take into account the rules of the grievance board guaranteeing to grievants the right to examine and cross-examine witnesses. The Foreign Service Act established the Foreign Service Grievance Board, assigned *it* exclusive jurisdiction and authority for dealing with the class of grievances here represented, and set out in detail

the hearing procedures to be followed in such cases. The Regulations of the FSGB implementing the statutory provisions require that "[e]ach party shall be entitled to examine and cross-examine witnesses." (22 C.F.R. § 906.8(a). Appendix 251) The procedure utilized by Respondents denied Petitioner that critical right to cross-examine, a recognized element of due process. Instead, the FSGB accepted as its sole evidence the recommendation of the RSB,[1] thus denying to grievant any opportunity to test its fairness, accuracy and validity. At best, this finding was opinion testimony on the ultimate question upon which the Government bore the burden — would the grievant not have been promoted despite the prejudicial evaluation. That issue can hardly be resolved on "hearsay" conclusory evidence without rendering the statutory grievance hearing a sham.

2. Respondents focus their argument on the wide legal latitude bestowed upon the FSGB to receive "any oral or documentary evidence," subject only to restriction that such evidence not be "irrelevant, immaterial, or unduly repetitious." (22 U.S.C. 4136(4), Appendix 237). They imply (Opp. 3, final sentence), that other evidence exists to show that Petitioner would not have been promoted to the Senior Foreign Service in 1983 in the absence of the agency errors Petitioner

[1]Respondents have stated that "Petitioner does not dispute that the RSB mechanism resembles as closely as possible the selection boards that are mandated by the Foreign Service Act of 1980." (Opp. 5) However, the record documents the differences between the relevant 1983 Selection Board that met for three full months to rank the complete performance files of more than five hundred officers at the FS-1 level, whereas the RSB met for less than one day to compare Petitioner's file with the files of an unrepresentative sample of FS-1 officers, all of whom were promoted in 1983. Furthermore, the original panel was publicly announced, under procedures that were negotiated and accepted by the American Foreign Service Association, whereas virtually no one knew of the existence of the RSB until after it had completed its work. Finally, grievant in this process was "red flagged" to the RSB, selected to support an earlier selection board's conclusion.

complained of. In fact, the report of the RSB was not a pre-existing document that had been prepared in the ordinary course of business. It was produced solely for the purpose of this litigation, designed to be conclusive "proof" on the ultimate issue at stake, and prepared at the direction of the parties with an interest in its outcome. Resolution of the ultimate question at issue by delegation to a RSB stretches the hearsay rule beyond reasonable limit.

3. Respondents repeat Petitioner's acknowledgement that there is no conflict with any other court of appeals, yet they abbreviate that acknowledgement omitting that because of the central location of the Department of State there is not likely to be review by any other circuit. Instead, Petitioner's reliance was upon a question of exceptional importance, namely that the Foreign Service Act affects the careers of a significant number of Foreign Service Officers charged with executing the foreign policy of the United States, and that the fundamental guarantees of their employment — objective promotion through selection boards, and review of selection board error through grievance board hearings — is undermined through resort to the findings of a reconstituted selection board.

CONCLUSION

In view of the foregoing, Petitioner prays that this Court grant certiorari.

Respectfully submitted,

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December 21, 1989